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Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

HANDLE WITH CARE BEHAVIOR MANAGEMENT SYSTEM, INC.,

Petitioner,

- against -

NEW YORK STATE DIVISION FOR YOUTH, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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On the Petition

May 12, 2009

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QUESTION PRESENTED

Does a complaint state a Rule of Reason violation of Section One of the Sherman Act by alleging specific actual anti-competitive effects, irrespective of the relevant market definition?

PARTIES TO THE PROCEEDING

Bruce CHAPMAN and Handle With Care Behavior Management System, Inc., Petitioners,

v.

NEW YORK STATE DIVISION FOR YOUTH, New York State Office of Children & Family Service, New York State Department of Social Services, John Johnson, Commissioner of New York State Office of Children and Family Services, and former Commissioner of the New York State Division for Youth, in his official and individual capacity, Margaret Davis, former Director of Training for the New York State Division for Youth, and former Director of Training for New York State Office of Children and Family Services, in her official and individual capacity, Patsy Murray, former Associate Training Technician for the New York State Division for Youth, and current position as Trainer for New York State Office of Children and Family Services, in her official and individual capacity, Cornell University, Jeffrey Lehman, President of Cornell University, in his official and individual capacity, Doctor Hunter Rawlings, III, former President of Cornell University, in his official and individual capacity, New York State College of Human Ecology, Family Life Development Center, Residential Child Care Project, Therapeutic Crisis Intervention, Martha Holden, Project Director of the Residential Child Care Project and Therapeutic Crisis Intervention Trainer and Coordinator, in her official and individual capacity, Michael Nunno, Project Director of the Residential Child Care Project and Therapeutic Crisis Intervention Trainer and Coordinator, in his official and individual capacity,

Hillside Children's Center, Dennis Richardson, President and CEO of Hillside Children's Center, in his official and individual capacity, Douglas Bidleman, Employee of Hillside Children's Center and Therapeutic Crisis Intervention Trainer, in his official and individual capacity, Respondents.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Handle With Care Behavior Management System, Inc. is wholly owned by Bruce Chapman, its President and sole shareholder. It does not have a parent corporation and no publicly traded company owns 10% or more of Petitioner's stock.

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The judgment and opinion of the United States Court of Appeals for the Second Circuit, was issued on October 14, 2008. An order denying a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, was issued on February 11, 2009

JURISDICTION

Subject matter jurisdiction of the United States District Court for the Northern District of New York was conferred pursuant to 15 U.S.C.A. §§ 15 and 26, 28 U.S.C.A §§ 1331, 1337, 1343 and 1367.

Appellate jurisdiction was conferred on the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. §§ 158 and 1291.

Pursuant to 28 U.S.C. §2101 and Rule 13 of this Court, this petition for a Writ of Certiorari was filed within ninety (90) days after entry of the order denying discretionary review. The statutory provision believed to confer jurisdiction on this Court to review this Writ of Certiorari is 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

15 U.S.C.A. § 1

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C.A. § 15

§ 15. Suits by persons injured

(a) Amount of recovery: prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under

this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only--

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

* * * *

(c) Definitions

For purposes of this section--

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28 . . ..

15 U.S.C.A. § 26

§ 26. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of Title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

STATEMENT OF THE CASE

The Allegations in the Complaint: The Autonomy of the Private Foster Agencies and OCFS's Regulatory Oversight

Petitioner Handle With Care Behavior Management System, Inc. ("HWC") is a provider of training in physical restraint and behavior management to public and private agencies in New York State and elsewhere. HWC alleged collective conduct by Respondents Cornell University ("Cornell"), The New York State College of Human Ecology ("CHE"), and a state agency now known as the New York State Office of Children and Family Services ("OCFS").

Respondents' collective conduct, persisting over twelve years, consisted of an agreement under which OCFS refused regulatory approval of the restraint policies of each of the approximately160 privately-owned and autonomous foster care agencies (termed "Private Foster Agencies," or "PFAs," herein)[1]

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[1] This number is from 31 New York State Register 18 (May 6, 2009) at 4 (available at http://nysl.nysed.gov/Archimages/107315.PDF). PFAs are the principal institutions in New York State that take in foster children. The Complaint used various terms to describe the PFAs, such as "child care providers" (¶ 23) and "private child care providers" (¶ 31). They are statutorily defined as "voluntary authorized agencies." N.Y. Soc. Serv. Law §§ 371(10)(a) and (c); 18 N.Y.C.R.R. § 441.2(b). Unless otherwise indicated, paragraphs citations herein are to the Complaint, and "A" citations are to pages in the Joint Appendix in the

throughout New York State -- unless each PFA contracted with Cornell to use Cornell's "Therapeutic Crisis Intervention" ("TCI") program to provide restraint training to PFA staff (¶¶ 35, 87, 90; A-48, A-95 - A-102, A-124 - A-136).[2] CHE works with Cornell in marketing the TCI program and in providing the training (¶¶ 91-92).

Statutes and regulations governing PFAs afford such agencies substantial autonomy. N.Y. Soc. Serv. Law ("NY-SSL") § 460-a; 18 NYCRR §§ 441.3, 482.3.[3] The PFA's board of directors manages the affairs of such agency, 18 N.Y.C.R.R. § 441.3(a)(1)) and the chief executive officer ("CEO") is responsible to the board. 18 N.Y.C.R.R. § 441.3(a)(4)(i). The boards of the PFAs are charged with "assur[ing] the proper care of children for whom such agency is responsible." 18 N.Y.C.R.R. § 441.3(a)(4)(iii). The responsibilities of the CEO of a PFA -- that is, not OCFS -- include the duty to "direct, evaluate and coordinate all aspects of an agency's program," including "staff development *and training*."

Second Circuit. (Citations to the Appendix hereto are denominated with "a" following the page number.)

[2] The Complaint used various phrases for the training provided to the PFAs, *e.g.*, "use of force program" (¶ 36), "behavior management" (¶ 36), "crisis intervention" (¶ 36) and "restraint training " (¶ 90).

[3] PFAs are licensed and supervised by OCFS. NY-SSL § 462; 18 N.Y.C.R.R. §§ 477.4, 482.3. *See generally* 18 N.Y.C.R.R. Ch. II, sub. C. Any private corporation that provides foster care must obtain written approval by OCFS before filing its certificate of incorporation. NY-SSL § 460-a; 18 N.Y.C.R.R. §§ 477.1, 477.4.

18 N.Y.C.R.R. § 441.3(c)(1) (emphasis added).

In the area of PFAs' restraint policy and related training, PFAs are given an administrative budget for such things as training, which, when provided by OCFS, is charged to the state-funded portion of the PFAs' administrative budget. OCFS merely requires that PFAs submit their restraint policies to OCFS for biannual approval (¶¶ 82-84). 18 N.Y.C.R.R. § 441.17. OCFS, *inter alia*, ensures that the staff of PFAs receives training in "safety and security procedures . . . [and] techniques of . . . child management including crisis intervention . . .." NY-SSL § 462. In order to use any physical restraint on a child in its care, a PFA must first submit its restraint policy to OCFS, including its plan for training its staff in the use of restraint. 18 N.Y.C.R.R. § 441.17(c)-(d)(4)(i)-(ii); 18 N.Y.C.R.R. § 441.17(h)(1)(iv).

Most significantly, there is no law or regulation requiring -- or even permitting -- OCFS to mandate that PFAs use any particular source of training, including outside vendors of restraint training.

The Allegations in the Complaint: The Respondents' Misconduct

OCFS, with the agreement and participation of Cornell, has "systematically refus[ed]" to allow PFAs to select their own restraint training vendors (¶¶ 34, 86, 88-90).[4] OCFS's coercion of PFAs to use Cornell's TCI

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[4] A 1994 "Memorandum of Agreement" ("MOA") between Cornell, acting on behalf of itself and CHE, and OCFS

program gives Cornell and OCFS a "monopoly situation within the State of New York" by forbidding PFAs the freedom to contract with Petitioner HWC or any other vendor of restraint training (¶¶ 36, 38, 90). As a result, PFAs expressing an interest in using HWC's (and others') programs have been coerced by OCFS into *not* using HWC or those other providers (¶¶ 71-73).

OCFS has also indicated directly to HWC that OCFS would simply not permit HWC (or any vendor other than Cornell) to provide restraint training to the PFAs (¶¶ 73, 88, 89). OCFS has specifically informed HWC that, although PFAs are theoretically free to negotiate with, and select, HWC for training programs, OCFS would ultimately refuse to approve any such arrangement, relying on 18 N.Y.C.R.R. § 441.17(c), which requires approval in writing by OCFS (¶¶ 84, 86, 88). PFAs "can only use [Cornell's] TCI as their use of force training provider or risk their license and ability to do business within the State of New York" (¶¶ 71-72, 88, 89), thus giving Cornell -- in conjunction with Cornell and CHE, "monopoly control" over the restraint training services provided to and purchased by PFAs in New York State (¶ 90).

The anticompetitive effect of Respondents' actions is not illusory. This arrangement between OCFS and Cornell has enabled Cornell to bill New York State over four times the amount Cornell charges its non-OCFS-regulated clients for the exact same TCI

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established the basic outline of the agreement (¶¶ 91-92; A-141 - A-154).

training (¶¶ 40, 89-92; PrBr[5] at 3, 15). The cost of this training, although initially paid by OCFS, is ultimately absorbed by the PFAs through a corresponding reduction in their administrative budget allotment. Moreover, OCFS, Cornell and CHE all benefitted financially from these artificially inflated prices because federal reimbursement has covered 75% of the cost of this training (¶¶ 91-92, 96-97; PrBr at 15 n.9, 30-32; RepBr[6] at 15 n.15, 29, 37 n.32). Hence, instead of seeking competitive prices as required by federal and state law, OCFS had a strong incentive to favor the high prices for the TCI training (and the exclusion of other vendors) because OCFS has been repaid most of the "cost" of Cornell's overpriced TCI training under Title IV-E of the Social Security Act (¶¶ 14, 35; PrBr at 30-32; RepBr. at 15,29, 37 n.32).[7]

This exclusive arrangement has also suppressed

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[5] "PrBr" citations are to Petitioner's Corrected Brief, submitted to the Second Circuit on July 10, 2006.

[6] "RepBr" citations are to Petitioner's Reply Brief, submitted to the Second Circuit on October 6, 2006.

[7] *See also* Amended Complaint in *United States of America ex rel. Chapman v. Cornell University, et al.*, 1:04-CV-1505 (N.D.N.Y. 2005)("*Qui Tam* Complaint"). The *Qui Tam* Complaint was filed by Bruce Chapman, HWC's president, pursuant to the False Claims Act, 31 U.S.C.A. §§ 3729 *et seq.* The allegations of the *Qui Tam* Complaint, brought in favor of the Government, are that Cornell, CHE and OCFS submitted false claims for reimbursement of the costs of TCI training under Title IV-E of the Social Security Act, by, *inter alia*, violating federal regulations regarding competitive pricing requirements for using outside vendors.

quality competition (A-174 - A-176; A-253 - A-257; PrBr at 15; http://www.aichhorn.org/aichhome2.html). For example, a February 12, 2003 article from *New York Teacher* explained that New York State United Teachers chose HWC's restraint training program over others because "it met more of the needs expressed during focus groups" (A-256).

Respondents did not present any pretense of some putative goal of efficiency, quality or any legitimate interest in imposing the substantially more expensive TCI program on the PFAs. Respondents did not even deny that this was manifestly anticompetitive behavior, conceding below that the Complaint "may be broadly and liberally construed to alleged [sic] anticompetitive conduct" (Docket No. 51 at 15). They also pointed to the ongoing 14-year Cornell/CHE-OCFS relationship and the MOA, which expressly concedes as one of its goals the maximization of federal funding for the sale of TCI (¶¶ 91-92; A-141; RepBr at 7-10, 19).

The Decisions Below

HWC had only one chance to plead its antitrust claims, as the District Court dismissed them with prejudice, concluding that the alleged relevant market was underinclusive, and rejecting the arguments of per se violations.[8]

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[8] The Complaint also stated federal copyright claims, alleging that OCFS infringed upon HWC's and Mr. Chapman's copyrighted training materials. The District Court dismissed the copyright claims, also with prejudice (A-296, A-316). The Second Circuit reversed the judgment dismissing the copyright

The Second Circuit affirmed, though acknowledging that a dismissal of an antitrust complaint without leave to amend is appropriate only "in extraordinary circumstances." The Second Circuit decision did not review HWC's allegations that an actual anticompetitive effect resulted from both the supracompetitive pricing and exclusion of competition, nor HWC's contention that per se liability might be shown through discovery. The Court simply held that HWC had failed to allege a "properly defined" relevant market, which it found fatal to all of HWC's antitrust claims.[9]

The Second Circuit denied Petitioner's Petition for Panel Rehearing and Petition for Rehearing *En Banc* on February 11, 2009.

REASONS FOR GRANTING THE PETITION

I. THE DEFINITION OF A RELEVANT MARKET IS NOT ESSENTIAL TO A SECTION ONE CLAIM WHERE THE COMPLAINT ALLEGES ACTUAL DETRIMENTAL EFFECTS ON COMPETITION THAT SUBVERTED BUYERS' CHOICES AND DISTORTED

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claims, which, together with a number of supplemental state law claims, are now before the District Court.

[9] All Respondents asserted antitrust state action immunity and OCFS asserted Eleventh Amendment immunity as well. The District Court expressed a negative view of these defenses, but ultimately did not rule on them, nor did the Second Circuit.

PRICING

Introduction

Petitioner sought to cast its antitrust claims both as a rule of reason case, generally requiring a relevant market in the Second Circuit, and, in the alternative, as a per se case. It was unable to satisfy the District Court and the Second Circuit, despite the Complaint's allegations of very specific -- and *actual* -- adverse effects on competition, including prices charged by Cornell that *quadrupled* what Cornell charged its non-OCFS-regulated customers, thus injuring competition and also damaging Petitioner. When challenged by Respondents' motions to dismiss, Petitioner fought for rule of reason liability based upon an asserted relevant market circumscribed by the regulatory environment of the New York State-licensed PFAs -- *i.e.*, with the requirement of licensing by OCFS, combined with OCFS's continuing review and requisite approval of their training policy and training vendor. Likewise, Petitioner asserted various per se theories of liability.

Rule of Reason Liability

As long ago as *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 110, 104 S.Ct. 2948, 2965 (1985) ("*NCAA*"), this Court has held that a Section One case can go forward even absent a detailed analysis of "market power," given obvious anticompetitive effects from the challenged action. As Justice Stevens further wrote in *NCAA*, "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output." 468 U.S.

85, 109, 104 S.Ct. 2948, 2964 (1985). Both the Solicitor General and Professor Areeda agreed with such an analysis, Professor Areeda noting that "the rule of reason can sometimes be applied in the twinkling of an eye." *Id.*, 468 U.S. at 110 n.39, 104 S.Ct. 2965 n.39, quoting P. Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues* 37-38 (Federal Judicial Center, June 1981). The Solicitor General observed that "in the market for television programming -- no matter how broadly or narrowly the market is defined -- the NCAA television restrictions have . . . *subverted* viewer *choice*, and *distorted pricing*" and thus in such circumstances, "a lengthy analysis of market power is not necessary." *Id.*, 468 U.S. at 110 n.42, 104 S.Ct. 2965 n.42. *See also Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447, 106 S.Ct. 2009 (1986) ("*Indiana*").

The Consequence of Allegations of Specific Actual Detrimental Effects

In *Indiana*, the Court reiterated that the definition of a relevant market, as a prerequisite to demonstrating market power, is not universally required in all Section One rule of reason cases. This is so because market power itself is not always a prerequisite to a Section One claim. The Court in *Indiana* held, in pertinent part:

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual

> detrimental effects, such as a reduction of output," can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects."

Indiana, 476 U.S. at 460-61, 106 S.Ct. at 2019, quoting 7 P. Areeda, Antitrust Law ¶ 1511, p. 429 (1986).

Professor Sullivan, as well, has urged *actual* anticompetitive effects as the *optimal* standard by which to test market power. He concludes that market share (which requires definition of a relevant market) is only a "second-best" test for determining whether market power exists, whereas a "universal measure of market power," the so-called "Lerner Index," would actually determine how long a seller is able to sustain a relatively high markup. Sullivan concludes:

> Successful use of this method would eliminate the need for defining the market. Market share would become irrelevant if it could be established that a market participant was charging a price that could only be consistent with market power. Put another way, if a firm can sustain prices significantly in excess of marginal cost, the market would have to be defined in a way that confirms the existence of this power.

L. Sullivan & W. Grimes, The Law of Antitrust: An Integrated Handbook § 26a (2000) ("Sullivan").

Justice Stevens's opinion in *NCAA*, adopting the

logic of Areeda and the Solicitor General, makes patent the unreasonableness of the dismissal of this case. Applying the facts of this case to the above words of the Solicitor General quoted in *NCAA*, "[I]n the market for providing restraint training -- no matter how broadly or narrowly the market is defined -- the restrictions of OCFS and Cornell have . . . *subverted* the PFAs' choice, and *distorted pricing*." *See NCAA*, 468 U.S. at 110 n.42, 104 S.Ct. 2965 n.42.

The distortion of price resulting from Respondents' actions is detailed above. The subversion of choice (and, as Petitioner has alleged, a diminution of quality competition) is also present. *See* PrBr 3, 12-15. Restraint training vendors have simply accepted that Cornell's TCI is "mandated" by New York State. *See* "The Allegations in the Complaint: The Respondents' Misconduct," *supra*.

It is understandable why the District Court and Second Circuit would be reluctant to use per se categorization for a novel case with an unusual regulatory scheme.[10] However, that does not mean that the rule of reason analysis must undergo a tortuous relevant market calculus before reaching a conclusion about the anticompetitive effect of the antitrust misconduct alleged here -- especially at the pleading stage! Indeed, as this Court held in *California Dental Assoc. v. F.T.C.*, 526 U.S. 756, 779-80, 119 S.Ct. 1604,

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[10] In the Second Circuit, Petitioner did not abandon potential per se categorizations, but asserted that, given the uniqueness of the case, discovery might be required before such a determination could be made. PrBr at 36.

1617 (1999), citing *NCAA*, *supra*:

> The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like "per se," "quick look," and "rule of reason" tend to make them appear. We have recognized, for example, that "there is often no bright line separating per se from Rule of Reason analysis," since "considerable inquiry into market conditions" may be required before the application of any so-called " per se " condemnation is justified. *Id.*, at 104, n. 26, 104 S.Ct. 2948. "[W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same-whether or not the challenged restraint enhances competition." *Id.*, at 104, 104 S.Ct. 2948.

In other words, the defendant's market power is implied where sufficient harm to competition is shown. As Professor Sullivan noted:

> [T]he Breyer opinion [concurring in part and dissenting in part in *California Dental*] can serve as a checklist for the points that a court or agency should address in explaining why it concludes that truncated analysis is sufficient: how the restraint can hurt competition; why any offsetting benefit claims are deficient; and why an inference of sufficient power

> to do market harm is warranted.

Sullivan § 5.3f. Justice Breyer's checklist would certainly help the Court focus on the non-commercial motive of OCFS and Cornell to impose high prices on the PFAs, given the high level of federal reimbursement. On this score too, Professor Sullivan's analysis is apt:

> A seller may also enjoy market power if the buyer can pass on the costs of a purchase to a third party that does not exercise cost discipline over the buyer's purchase decision. Such buyer pass-on may sometimes occur in health care, where many patients pay little or nothing to receive health care services that are covered by government or private health insurance.

Sullivan § 2.4e.

This Court's forthright admission in *California Dental*, quoted above, that its "categories of analysis . . . are less fixed than [their names] tend to make them appear," and its acknowledgment of "no bright line separating per se from Rule of Reason analysis" -- have simply not always been heard by the district courts and their reviewing Circuits. Instead of considering these cases and their progeny as "The Modern Synthesis of Per Se and Rule of Reason Analysis" (Sullivan § 5.3), the fact is that many courts have instead "often *blindly used* [market definitions] as a surrogate for more sensitive market analysis . . .." Sullivan § 2.6b.

The alleged antitrust misconduct, given full review, is indeed a candidate for per se categorization or, failing that, some equally strong condemnation using a rule of reason analysis, using factual analysis developed through limited discovery. Such theories of liability could well include: a collective or concerted refusal to deal; conspiracy with a licensor (OCFS) to eliminate competitors (HWC and others); vertical price-fixing by OCFS and Cornell, by virtue of their exercise of control over the PFAs; or a "regulatory tie-in." *See* Pr Br 35-40; RepBr 32-45 (discussing, *inter alia,* Section One liability arising out of state and local government-mandated legal monopolies). Notably, liability resulting in part from the actions of a state, acting with private parties, may be imposed for price and choice restrictions that are imposed horizontally on unwilling parties, such as the PFAs. *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345-46 n.8 (1987) (holding Section One claims made out by state action compelling private parties to engage in anticompetitive behavior, calling this a "hybrid" restraint); *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205 (2d Cir. 2004) (confirming that a state may not "becom[e] a participant in a private agreement . . . for restraint of trade").[11] This

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[11] *Freedom Holdings* rejected a claim of state action immunity where, as here, there was "no mechanism . . . whereby New York may review the reasonableness of the pricing decisions of [the parties]." 357 F.3d at 231 (internal quotation marks and citation omitted). Accordingly, the exhortation of two antitrust scholars is appropriate here: "Private parties who restrain trade pursuant to government directives do so at their peril." J. Lopatka & W. Page, *State Action and the Meaning of Agreement Under the Sherman Act: An Approach to Hybrid Restraints*, 20 Yale J. Reg. 269, 292

Court has summarized,

> "The national policy in favor of competition cannot be thwarted by casting such a *gauzy cloak of state involvement* over what is essentially a private price-fixing arrangement."

Hoover v. Ronwin, 466 U.S. 558, 599 (1984), quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980) ("*Midcal*") (other internal citations omitted).

II. THE CIRCUITS ARE SPLIT ON WHETHER A SECTION ONE CLAIM MUST ALLEGE A RELEVANT MARKET WHEN THE COMPLAINT ALSO ALLEGES SPECIFIC AND ACTUAL ADVERSE EFFECTS ON COMPETITION

In the wake of *Indiana*, *supra*, there is both a split among the Circuit Courts and even significant confusion *within* some of the Circuits -- including the Second Circuit -- as to whether a plaintiff who pleads or shows actual detrimental effects from antitrust misconduct is relieved from the burden of also specifically defining a market in order to assess a defendant's market power.

The majority of Circuit Courts, in following *Indiana*, have answered this question in the

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(2003).

affirmative. *Nilavar v. Mercy Health System-Western Ohio*, 244 Fed.Appx. 690, 695 (6th Cir. 2007) (holding that significant evidence of competitive harm obviates need to define geographic market and determination of market power, citing *Indiana*); *Spanish Broadcasting System of Fla., Inc. v. Clear Channel Communications, Inc.*, 376 F.3d 1065, 1073 (11th Cir. 2004) (determining that only if the complaint does not allege "actual, sustained adverse effects on competition" must a reviewing court explore whether the complaint's allegations "define the relevant market and establish that the defendants possessed power in that market"), citing *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996); *Brookins v. International Motor Contest Ass'n*, 219 F.3d 849, 852 (8th Cir. 2000) (holding that injury to competition is shown by either market power in a relevant market or an "actual adverse effect on competition"); *Flegel v. Christian Hosp.*, 4 F.3d 682, 688 (8th Cir. 1992) (holding a showing of either market power or "actual detrimental effects" shifts burden to defendant to demonstrate pro-competitive effects); *Spectators' Communication Network, Inc. v. Colonial Country Club*, 253 F.3d 215, 225 (5th Cir. 2001) (holding that as purpose of market definition and market power is to determine potential for genuine adverse effect on competition, proof of actual detrimental effects can obviate need for such inquires).

The Ninth Circuit has likewise so held. "[The] failure to pinpoint precisely the relevant market through detailed analysis is not uniformly fatal to a claim under Sherman Act § 1." *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1448 (9th Cir.1988).

"Because market definition and market power *are merely tools* designed to uncover competitive harm, proof of 'actual detrimental effects, such as a reduction of output, can obviate the need ... [for] elaborate market analysis.'" *Id.*, 861 F.2d at 1448, quoting *Indiana*, 476 U.S. at 460-61. *See also Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd*, 924 F.2d 1484, 1489 n. 3 (9th Cir.1991); *Kemper v. Merle Norman Cosmetics, Inc.*, 15 F.3d 1086, 1994 WL 6601 (9th Cir. 1994).

Most of the above cases applied the *Indiana* concept at advanced stages of litigation well beyond the initial pleadings, such as in deciding summary judgment motions. Clearly, *a fortiori*, the logic of these cases applies even more strongly to a motion to dismiss -- the procedural stage at which Plaintiffs' antitrust claims were dismissed below. *Accord Spanish Broadcasting, supra.*

Other Circuits, however, are in conflict, holding fast to the requirement that a plaintiff must define a relevant market, even where *Indiana*'s "actual competitive effects" are shown or pleaded. *Republic Tobacco Co. v. North Atlantic Trading Co., Inc.*, 381 F.3d 717, 736-37 (7th Cir. 2004) (holding that Section One plaintiff may not "dispense entirely" with market definition).[12]

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[12] As the Seventh Circuit put it in *Republic Tobacco, supra* -- in what can only be described as a valiant attempt at harmonizing the cases -- "neither *Toys 'R' Us nor Indiana Federation of Dentists* allows an antitrust plaintiff to dispense entirely with market definition. Rather, these cases stand for the proposition that if a plaintiff can show the *rough contours* of

Still other Circuits have left open whether such "direct evidence" will obviate the need for a relevant market definition, or have issued conflicting and/or confusing statements on this issue. *Craftsmen Limousine, Inc. v. Ford Motor Co.* 491 F.3d 380, 388 (8th Cir. 2007) ("[A] plaintiff may put forth evidence of 'actual sustained adverse effects on competition' in the relevant market."); *Worldwide Basketball & Sport Tours v. NCAA*, 388 F.3d 955, 960-61 (6th Cir. 2004), *cert. denied*, 126 S.Ct.334 (2005) (conflicting with and never harmonized with a subsequent Sixth Circuit decision, *Nilivar*, supra, and holding that proof of actual anti-competitive effects did not necessarily obviate the eventual need for a formal market analysis under the rule of reason, but was instead merely limited to those situations involving "the abbreviated or quick-look analysis.").

In apparent frustration with the oversimplistic use of the categories of per se versus rule of reason, the Eleventh Circuit has even elucidated a rule for patent cases, finding that "neither the rule of reason nor the per se analysis is appropriate in this context." *Schering-Plough Corp. v. F.T.C.*, 402 F.3d 1056, 1065 (11th Cir. 2005).

The Second Circuit has traveled a somewhat tortured path in interpreting *Indiana*. For a time, at least in some opinions, the Second Circuit appeared to

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a relevant market, and show that the defendant commands a substantial share of the market, then direct evidence of anticompetitive effects can establish the defendant's market power . . .." 381 F.3d 717 at 737.

lean in the direction of allowing a showing of "actual anticompetitive effects" in lieu of a formal market analysis in rule of reason cases.

> Rule of reason analysis requires the antitrust plaintiff to bear the initial burden of demonstrating that the defendants' conduct or policy has had a substantially harmful effect on competition. The plaintiff may satisfy this burden without "detailed market analysis" by offering "proof of actual detrimental effects . . .."

Capital Imaging Associates, P.C. v. Mohawk Valley Medical Assocs., 996 F.2d 537, 546 (2d Cir. 1993), quoting *Indiana*, 476 U.S. at 460-61, 106 S.Ct. at 2019.

The panel opinion below cited *Todd v. Exxon Corp*, 275 F.3d 191 (2d Cir. 2001) for the general rules for defining a relevant product market, thus appearing to side with the Seventh Circuit and deviating from the "majority interpretation" of *Indiana*. However, somewhat ironically, *Todd* itself, following *Capital Imaging*, adopted this view of "actual adverse effect" substituting for a precisely defined relevant market that was posited in *Capital Markets*, stating:

> If a plaintiff can show that a defendant's conduct exerted an *actual adverse effect on competition*, this is a strong indicator of market power. In fact, this arguably is *more direct evidence of market power* than calculations of elusive market share figures.

Todd, 275 F.3d at 206. Indeed, *Todd* seemed to go even further:

> In this Circuit, a threshold showing of market share is not a prerequisite for bringing a § 1 claim. *See K.M.B. Warehouse Distributors, Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir.1995). "If a plaintiff can show an actual adverse effect on competition, such as reduced output ... we do not require a further showing*207 of market power." *Id.* (citation omitted); *see also Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 546 (2d Cir.1993) (explaining that plaintiff may avoid a " 'detailed market analysis' by offering 'proof of actual detrimental effects, such as a reduction of output' ") (quoting *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986)).

275 F.3d at 206-07.

Since *Todd*, many Second Circuit decisions have not been clear and have even conflicted with *Todd* in two respects. First, some decisions have stated the rule as requiring *both* a finding of "market power" *and* "substantial adverse effects on competition, such as increases in price, or decreases in output or quality." *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003). Even in *Visa U.S.A.*, however, the Second Circuit recognized that "[s]ome authorities suggest that the market power requirement is unnecessary[,]" citing *Indiana*, *NCAA* and its own decision in *K.M.B.* (quoted in *Todd*, *supra*). *Id.* at 238 n.4. Ultimately, even

though "some authorities" included *two opinions of this Court*, the Second Circuit in *Visa U.S.A.* found that, because the district court had found market power in the relevant markets, "[w]hether market power is a necessary element is of no moment here . . .." *Id.*

What the Second Circuit "ducked" in *Visa U.S.A.*, it was confronted with in the case at bar below. After and despite *Todd*, *Visa U.S.A.* and other decisions, the Court repeated the requirement for a showing of "actual anticompetitive effects" *in* the relevant market. On still other occasions, the Second Circuit has summarily lumped together the requirement of showing "an actual adverse effect on competition" with such taking place in a "relevant market." *E.g.*, *George Huag Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 139 (2d Cir. 1998). It appears that in Second Circuit, the pendulum has swung in favor of a very strict test, with a three-step process:

> First, the plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market. Then, if the plaintiff succeeds, the burden shifts to the defendant to establish the pro-competitive redeeming virtues of the action. Should the defendant carry this burden, the plaintiff must then show that the same pro-competitive effect could be achieved through an alternative means that is less restrictive of competition.

In re Ciprofloxacin Hydrochloride Antitrust Litigation, 544 F.3d 1323, 1332 (2d Cir. 2008),[13] quoting *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997) (other internal citations omitted). *See also Madison Square Garden, L.P. v. National Hockey League*, 270 Fed.Appx. 56 (2d Cir. 2008) (same); *E & L Consulting, Ltd. v. Doman Industries Ltd.*, 472 F.3d 23, 31 (2d Cir. 2006) (holding "[t]he complaint simply does not allege, therefore, 'that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market,'" citing *Capital Imaging*, 996 F.2d at 543 (emphasis in original); *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.*, 386 F.3d 485, 506-07 (2d Cir.2004) (same).

Hence, Petitioner became essentially "marooned" between per se theories and the rule of reason requirement of a relevant market, while making an effort to meet the definition of either or both theories, based upon Second Circuit precedent.[14]

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[13] The use of the phrase "actual adverse effect on competition as a whole in the relevant market" seems wholly at odds with *Indiana*. The phrase, at least in haec verba, is only found in Second Circuit decisions.

[14] Petitioner persists on the availability of per se categories for the actions of the Respondents, while aware that such a unique fact pattern as this case presents may not predispose the Court to endorse a per se category at the pleading stage. *See* PrBr at 36-37; RepBr at 44 n.36. In the total absence of any assertion of a pro-competitive or other salutary purpose for the OCFS/CHE-Cornell restraint on competition among training vendors for training the staff of 160 PFAs in New York State, it is hardly a stretch to classify it as "conclusively presumed to be unreasonable and therefore

Of course, whether showing actual anticompetitive effects obviates the need to allege a relevant market, or is simply another way of proving market power, the record below demonstrates real market "power" on the part of the Respondents, in that Cornell has been able to charge the PFAs, through OCFS, four times the price Cornell itself charges its non-OCFS-regulated customers. Hence, whatever general rules may be emerging in this regard, *this case* depicts collective conduct that has allowed the coercion on the PFAs of the selection of one vendor to the exclusion of others, including HWC. The dismissal with prejudice of the Complaint was thus wholly inconsistent with this Court's Section One jurisprudence.

Regardless of how courts have interpreted *Indiana*, any continued requirement of a precise definition of relevant market at the pleading stage simply encourages premature and improper dismissals of meritorious Section One claims, as is the case here. As the Ninth Circuit stated in *Oltz*, "[d]efining the market is *not the aim of antitrust law* . . . the failure to pinpoint precisely the relevant market through detailed market analysis *is not uniformly fatal to a claim under Sherman Act § 1*." 861 F.2d at 1448 (emphasis added). The resultant uncertainty (and even confusion), intra-Circuit, as well as inter-Circuits, supports this Petition. *See, e.g., Northwest Wholesale, supra*, 472 U.S. at 289,

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illegal." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 289, 105 S.Ct. 2613, 2617 (1985). Such a categorization is best dealt with after discovery, as noted.

105 S.Ct. at 2616 (1985), where this Court granted certiorari "in an area of antitrust law that has not been free of confusion." This Court should grant this petition to resolve the conflict -- and at least diminish somewhat the outright confusion as to whether a relevant market need be shown or even pleaded where, as here, actual detrimental effects have been asserted in Petitioner's first -- and only -- antitrust Complaint alleging Section One violations.

CONCLUSION

The Decision of the United States Court of Appeals should be reversed, its Judgment vacated and the case remanded for further proceedings.

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
1:04-CV-867

BRUCE CHAPMAN; and HANDLE WITH CARE BEHAVIOR MANAGEMENT SYSTEM, INC.,

Plaintiffs,

vs

NEW YORK STATE DIVISION FOR YOUTH; NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; NEW YORK STATE OFFICE OF CHILDREN & FAMILY SERVICES; JOHN JOHNSON, Commissioner of New York State Office of Children and Family Services and former Commissioner of the New York State Division for Youth, in his Official and Individual Capacity; MARGARET DAVIS, Former Director of Training for the New York State Division for Youth, and former Director of Training for New York State Office of Children and Family Services, in her Official and Individual Capacity; PATSY MURRAY, Former Associate Training Technician for the New York State Division for Youth, and Current Position as Trainer for New York State Office of Children and Family Services, in her Official and Individual Capacity; CORNELL UNIVERSITY; JEFFREY LEHMAN, President of Cornell University, in his Official and Individual Capacity; DOCTOR HUNTER RAWLINGS, III, Former President of Cornell University, in his Official and Individual Capacity; NEW YORK STATE COLLEGE OF HUMAN ECOLOGY; FAMILY LIFE DEVELOPMENT CENTER; RESIDENTIAL CHILD CARE PROJECT; THERAPEUTIC CRISIS INTERVENTION;

MARTHA HOLDEN, Project Director of the Residential Child Care Project and Therapeutic Crisis Intervention Trainer and Coordinator, in her Official and Individual Capacity; MICHAEL NUNNO, Project Director of the Residential Child Care Project and Therapeutic Crisis Intervention Trainer, and Coordinator, in his Official and Individual Capacity; HILLSIDE CHILDREN'S CENTER; DENNIS RICHARDSON, President, and CEO of Hillside Children's Center, in his Official and Individual Capacity; DOUGLAS BIDLEMAN, Employee of Hillside Children's Center, and Therapeutic Crisis Intervention Trainer, in his Official and Individual Capacity; and JOHN DOE, 1 through 99,

Defendants.

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DAVID N. HURD
United States District Judge

MEMORANDUM-DECISION and ORDER

I. INTRODUCTION

Plaintiffs, Handle With Care Behavior Management System, Inc. ("HWC") and its president, Bruce Chapman ("Chapman", collectively "plaintiffs"), market a behavior management program which is used by persons who must physically restrain others. The allegations involve the misuse of plaintiffs' program and related conduct which plaintiffs allege affects the market for such services. The action is brought against three sets of defendants who have filed their motions accordingly.

The "state defendants" include New York State Office of Children and Family Services ("OCFS"), which assumed the functions of two other defendants in 1998 - New York State Division of Youth and Family Services ("DFY"); and New York State Department of Social Services ("DSS").[1] Defendant John Johnson was the former Commissioner of DFY, and now serves as the Commissioner of OCFS. Defendant Margaret Davis was the Director of Training for DFY, and now serves as the Director of Training for OCFS. Defendant Patsy Murray was an Associate Training Technician for DFY, and now serves as a Trainer for OCFS.

There are nine "Cornell defendants." Plaintiffs bring suit against Cornell University itself and two of its presidents: Jeffrey Lehman, a former president; and Hunter Rawlings III, its current president. Defendant New York State College of Human Ecology is a statutory college of State University of New York (the "College"). Three defendants are alleged

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[1] DFY operated juvenile facilities. DSS supervised child care providers.

subsidiaries of the College: The Family Life Development Center; The Residential Child Care Project; and Therapeutic Crisis Intervention ("TCI"). Finally, Martha Holden and Michael Nunno are Project Directors of The Residential Child Care Project and TCI Trainers and Coordinators.

The third set of defendants are referred to as the "Hillside defendants." Hillside Children's Center ("HCC") is a private childcare provider and residential treatment center. Plaintiff asserts claims against HCC, its president, Dennis Richardson, and its Coordinator for Sociotherapy Training, Douglas Bidleman.

Plaintiffs brings ten causes of action. The First through Fifth causes of action are brought against the state defendants: First cause of action, Copyright Infringement, 17 U.S.C. §§ 101 et. seq.; Second cause of action, Breach of Contract; Third cause of action, Fraud; Fourth cause of action, Conversion; and, Fifth cause of action, Tortuous Interference with a Business Relationship. The Sixth cause of action is brought only against the Hillside defendants for breach of contract.

The Seventh through Tenth causes of action are brought against all the defendants: Seventh cause of action, Monopolies, Restraint of Trade and Unfair Competition; Eighth cause of action, Conspiracy to Monopolize and Restrict Trade; Ninth cause of action, Misappropriation Tort for Business Scheme, Tort of Trade Secret Service Mark Dilution, Unfair Competition at Common Law; and Tenth cause of action, Unjust Enrichment.

The First, Seventh and Eighth causes of action are federal claims. The remaining causes of action are state law claims under supplemental jurisdiction.

The state and Cornell defendants move pursuant to Fed. R. Civ. P. 12 (b) to dismiss the

complaint as it pertains to them. The Hillside defendants move to dismiss the complaint pursuant Fed. R. Civ. P. 12 (c) and, in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56. Plaintiffs oppose. Oral argument was heard on February 28, 2005, in Albany, New York. Decision was reserved.

II. FACTS

New York State, through OCFS, formerly DFY and DSS, operates juvenile facilities and supervises child care providers within the state. It is sometimes necessary to "physically restrain juveniles in certain circumstances; for example when a juvenile threaten[s] an immediate injury to themselves, a DFY staff member, or other juveniles." (Docket No. 1, Complaint, ¶24.) ("Complaint at __".) To ensure the safety of the juveniles, child care providers must use state approved techniques.

> Pursuant to 18 N.Y.C.R.R. § 441.17 Restraint of children in care:
>
> (c) An authorized agency shall not use any method of restraint unless it has submitted its restraint policy to the department and such policy has been approved in writing by the department in accordance with subdivision (d) of this section.
>
> (3) The duration of department approval will be for a period of two years.

OCSF is charged with approving and regulating the training of such techniques pursuant to N.Y. Exec. Law § 501, which lists the functions, powers and duties

of OCFS. Listed among those duties, the statue explicitly requires the agency :

> 12. To promulgate regulations concerning standards for the protection of children in residential facilities and programs operated or certified by the division, from abuse and maltreatment. Such standards shall include the prevention and remediation of abuse and maltreatment of children in such residential facilities or programs, including procedures for:
>
> . . .
>
> . . . the characteristics of children in care and techniques of group and child management including crisis intervention. . .
>
> . . .
>
> The division . . . shall monitor and supervise the provision of training to such administrators, employees, volunteers, children and consultants.

Chapman, now president of HWC, has been involved in training others to use restraint techniques since the 1980s. The HWC program consists of a series of manuals, a performance based training program, and audio visual productions. (Complaint at ¶ 44.) Chapman obtained a copyright for HWC trainer's manual entitled "Handle with Care - A Revolutionary Approach to Behavior Management" and all written HWC materials were marked with a copyright notification. Id. at ¶ 45. "Child care providers and residential treatment centers frequently employ

vendors like HWC to provide a use of force program and train staff." Id. at ¶33. In fact, DFY contracted with Chapman for training services in 1987. (Docket No. 60, Goglia Dec. Ex. A.)

Prior to 1998, DFY was the agency responsible for the care and welfare of all juveniles in New York State's custody; and one of its responsibilities involved creating procedures and training staff in restraint techniques. Id. at 24. Between 1994 and 1996, while employing restraint techniques, DFY staff inflicted injuries on one juvenile and killed another. Id. at ¶¶ 26, 58. Thereafter, "DFY retained HWC to proved a safe use of force program and to train DFY staff in that program which included restraint techniques." Id. at ¶ 27. Defendant Director of Training Margaret Davis worked on the terms of the agreement. Id. at ¶ 60. "On or about April 23, 1997 a contract was entered into between [p]laintiff and DFY, whereby [p]laintiff agreed to deliver 12 days of training, certify staff as instructors and provide written and audio visual training materials." Id. at ¶ 50. According to plaintiff, each staff person signed contracts acknowledging that their ability to train [p]laintiffs program terminated one year post training. Id. at ¶ 62. Plaintiff asserts that the contract also limits the use of training materials to one year. Id. at ¶ 51.

After DFY merged into OCFS in 1998, OCFS continued to use HWC's program and techniques, allegedly, without license or permission and has been reproducing without license, authorization, permission or compensation to plaintiff. Id. at ¶¶ 30, 46. Plaintiffs' requests for the return of the materials have been ignored. Id. at ¶ 68.

In October of 2001, plaintiffs entered into a training contract with HCC. Id. at ¶ 76. The contract

provided that "the Agency and/or employee of the Agency receiving Handle With Care's program and training acknowledges that the Program and Training contain confidential information and trade secrets developed and owned by Handle with Care and agrees to treat such information as confidential." Id. at ¶ 77 (quoting the contract.) On or about August 2002, plaintiffs discovered that HCC and Douglas Bidleman, a HCC training coordinator, "appeared in TCI's training manual and video illustrating proprietary HWC information covered under the confidentiality clause of the contract." Id. at ¶ 79.

"New York State owns its own use of force program in conjunction with Cornell University and the State of New York College of Human Ecology. . . . This program is called TCI and is administered and controlled by Cornell University." (Complaint at ¶ 35, 87.)[2] Plaintiff alleges that TCI illegally incorporates "techniques, methods, materials, and information unique to and identified with HWC's program and training." Id. at ¶ 37. Plaintiff further complains that TCI and HWC are competitors and TCI's possession of HWC property is giving TCI an unfair advantage.

This action was prompted in part by an apparent policy change at OCFS wherein OCFS now refuses to allow agencies to submit use of force policies other than the policy promulgated by TCI. Id. at ¶¶ 34,36. This policy change, allegedly attributable to OCFS, Cornell, the College and TCI, "insure[s] that the

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[2] According to the Cornell defendants, Cornell owns the program but New York State has unlimited use of the materials. (Docket No. 51, Cornell's Mot. to Dismiss, 11.)

State's program has exclusive access to the market." Id. at ¶ 73. "OCFS has created an environment whereby private child care providers can only use TCI as their use of force training provider or risk their license and ability to do business within the State of New York." Id. at ¶ 88. This precludes plaintiffs and other vendors from the marketplace and creates a TCI monopoly in providing child restraint training services. Id. at ¶ 90.

III. DISCUSSION

A. Motion to Dismiss

In deciding a Rule 12(b)(6) motion, a court "must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant." Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir. 1994); see also Kaluczky v. City of White Plains, 57 F.3d 202, 206 (2d Cir. 1995). However, conclusory allegations that merely state the general legal conclusions necessary to prevail on the merits and are unsupported by factual averments will not be accepted as true. See, e.g., Clapp v. Greene, 743 F. Supp. 273, 276 (S.D.N.Y. 1990); Albert v. Carovano, 851 F.2d 561, 572 (2d Cir. 1988). The court's function is "not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient." Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985). Therefore, the defendants' present motions will only be granted if it appears that the plaintiffs can prove no set of facts in support of their claims that would entitle it to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Goldman, 754 F.2d at 1065.

B. Copyright Claims

The First cause of action against the state defendants alleges that "OCFS (formally DFY), without license, assignment or permission, took [p]laintiffs copyrighted materials, and has been reproducing such protected materials without license, authorization, permission or compensation to [p]laintiff." (Complaint at ¶ 46.) It is not disputed that the state defendants copied the materials. At issue is whether or not they were licensed to do so. This determination turns on the non-exclusive license to use the materials granted in the parties' contract. The state defendants assert that they were expressly authorized to copy HWC materials and "[a] copyright owner who grants a nonexclusive license to use his copyrighted material waives his right to sue the licensee for copyright infringement." Graham v. James, 144 F.3d 229, 236 (2d Cir. 1998). Plaintiffs assert that the contract contains a one-year limitation on defendants' license to reproduce the materials.

"In considering a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a district court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference." Kramer v. Time Warner, Inc., 937 F.2d 767, 773 (2d Cir. 1991). The complaint repeatedly refers to the contract, but plaintiffs declined to attach a copy to the complaint. Defendants included a copy as an exhibit and plaintiffs note that the exhibit "appears to be a copy" of the contract at issue. The contract is properly considered on this motion.[3] I. Meyer Pincus & Assoc., P.C. v.

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[3] As federal jurisdiction is lacking, the state law breach of contract claims will be dismissed without prejudice and

Oppenheimer & Co., 936 F.2d 759, 762 (2d Cir. 1991) (plaintiff not permitted to evade a properly argued motion to dismiss simply because plaintiff has chosen not to attach a document); Yak v. Bank Brussels Lambert, 252 F.3d 127, 131 (2d Cir. 2001).

In 1997, Chapman entered into the contract at issue with DFY. He agreed to "update and recertify existing Crisis Management/Physical Restraint trainers in the techniques encompassed in the Handle with Care Program." (Docket No. 60, Goglia Dec. Ex. B, 1.) The contract called for Chapman to deliver 12 days of training over a three-month period to approximately 120 state employees. Id. at 1-2. The contract also provides: "The Contractor acknowledges and agrees that the Division has the right to reproduce all training materials." Id. at 2. This is a logical inclusion because Chapman was training trainers who would require the materials.

Despite plaintiffs' repeated assertions, the contract simply does not contain a provision limiting this license to use the materials to one-year or any other duration of time. The contract, drafted by Chapman, is clear and unambiguous. Plaintiffs do not argue that it suffers any legal defect or otherwise attack the validity of the agreement. Plaintiffs never

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no comment is required as to those claims. However, it is noted that plaintiff also declined to attach the contract relevant to the Sixth cause of action alleging breach a contract against the Hillside defendants. The Hillside defendants claim to have no knowledge of that contract. In response to defendants' statement, plaintiff notes only that defendants have not cited a case or rule for the proposition that the contract must be attached to the complaint. This response sullies the spirit of liberal pleading requirements of Fed. R. Civ. P. 8 and taps the resources and patience of all involved in the litigation.

assert that any other representations were made or agreed upon extraneous to the contract.

Dismissal is proper where the documents upon which a claim is based show on their face an absence of any grounds for relief. Feick v. Fleener, 653 F.2d 69, 75 (2d Cir. 1981). Plaintiffs' allegations are contradicted by the contract itself and are therefore insufficient to defeat a motion to dismiss. Matusovsky v. Merrill Lynch, 186 F. Supp. 2d 397, 400 (S.D.N.Y. 2002) (citing Broadway LLC v. Credit Suisse First Boston, No. 00 Civ. 5773 2001 U.S. Dist. LEXIS 4875, *27 (S.D.N.Y. Apr. 20, 2001)). The copyright claim will be dismissed as plaintiffs have not demonstrated a limitation on defendants non-exclusive license to reproduce materials and therefore failed to state a claim upon which relief may be granted.[4]

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[4] As noted above, jurisdiction will be declined over the state law claims and thus plaintiffs' Second cause of action for breach of contract will be dismissed. It is noted however that it suffers from the same deficiency as the copyright claim because it is based on allegations that state defendants acted beyond a durational limitation: (1) "The contract provided that DFY to reproduce (sic) such written and audio visual materials for the benefit of its trainers and staff for a period of one year commencing on the date of training and ending on the training's one year anniversary." (Complaint at ¶ 51.); (2) "The contract also provided that DFY trainers could train DFY staff in Plaintiffs program for a period of one year commencing on the date of training and ending on the training's one year anniversary." (Complaint at ¶52.); and, (3) defendant has continued to reproduce the materials and continued to train staff beyond the one-year limitation (Complaint at ¶¶ 52, 53.)

C. Antitrust claims

In the Seventh and Eighth cause of action the plaintiffs bring antitrust claims against all of the defendants.[5] In short, plaintiffs allege that the Cornell defendants developed the TCI program which the state defendants require child care providers to purchase. Thus, these defendants have participated or acquiesced in a plan whereby TCI obtained a monopoly over the right to train private child care providers in New York State. (Complaint at ¶ 95.) Plaintiffs characterize this conduct under the Seventh cause of action as a monopoly, restraint of trade and unfair competition. Plaintiffs allege that essentially the same conduct constitutes a conspiracy to monopolize and restrain trade in the Eighth cause of action. Id. at ¶ 95.

These claims are brought pursuant to the Sherman Act §§ 1 and 2, 15 U.S.C. §§ 1 and 2.[6] Section 1 of the Sherman Act, makes unlawful "every contract, combination or conspiracy, in restraint of trade or

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[5] The Seventh cause of action never mentions the Hillside defendants. The Eighth cause of action simply lists them as conspirators. There are simply no allegations to support plaintiffs claims that the Hillside defendants participated in monopolization or conspiracy to monopolize the relevant market. Those claims are therefore subject to dismissal regardless of plaintiffs other pleading deficiencies. Heart Disease Research Foundation v. General Motors Corp., 463 F.2d 98, 100 (2d Cir. 1972).

[6] Plaintiffs clarified this portion of the pleading in opposition memorandum. (Docket No. 67, Pl.'s Opp'n Mem., at 10)

commerce among the several States." Section 2 of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." The defendants, in chorus, present two grounds for dismissing the claims: state action immunity and failure to define a market that supports an antitrust claim.

1. Immunity

"The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." Parker v. Brown, 317 U.S. 341, 351 (1943). Therefore, "[a]bsent a clear indication from Congress, the States are entitled to immunity as an aspect of the federal system." Hybud Equipment Corp. v. City of Akron, Ohio, 742 F.2d 949, 954 (6th Cir. 1984). Immunity may be extended to private parties who act in concert with the state in affecting its policies. Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc., 790 F.2d 1032, 1048 (2d Cir. 1986). Here the state defendants argue that they are entitled to Eleventh Amendment immunity, and the Cornell defendants argue that an extension of that immunity applies to their activities. As such, OCFS must be granted immunity in order for the private defendants to share in the benefit.

A state agency is entitled to immunity in one of two ways. First, the agency may be deemed an arm of the state in which the conduct of the agency is deemed the conduct of the state itself and is thus entitled to immunity. Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 61-62 (1994). Second, immunity

may be conferred through what is known as "authorization." "Where the activity . . . 'is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization,' the application of the exemption [is not as clear and] requires a more searching analysis." Id. at 955. (quoting Hoover v. Ronwin, 466 U.S. 558 (1984)). "[T]he anticompetitive conduct of a nonsovereign state representative . . . require[s] a showing that the conduct is pursuant to a 'clearly articulated and affirmatively expressed state policy' to replace competition with regulation." Hoover, 466 U.S. at 569 (citation omitted).[7]

"[T]he 'clear articulation' label is not quite the hurdle that its language suggests because it has always been construed as synonymous with the foreseeability test." Automated Salvage Transp. v. Wheelabrator Envtl. Sys., 155 F.3d 59, 69 (2d Cir. 1998). "So long as the resulting anticompetitive activities are a foreseeable consequence of the state delegation, the 'clear articulation' standard has been met. To meet this requirement the party claiming the state action defense must show that the 'legislature contemplated the action complained of." Cine 42nd Street Theater Corp., 790 F.2d at 1043 (citations omitted).

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[7] "[T]he challenged restraint must be '[f]irst, one clearly articulated and affirmatively expressed as state policy'; [and] second, the policy must be 'actively supervised' by the State itself." California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (quoting Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978) (opinion of Brennan, J.)). Active state supervision is not required where the actor is a state agency. Hallie v. Eau Claire, 471 U.S. 34, 46 n.10 (1985).

> [T]he enabling legislation need not explicitly authorize the exact actions undertaken. It is only necessary that the permitted actions produce anticompetitive consequences that foreseeably flow from the grant of state authority. That is, the enabling statute must affirmatively designate a particular area to be regulated, provide the methods of regulation, and create grounds for a reasoned belief that some anticompetitive activity could be envisioned.

Id. at 1043 -1044.

Defendants assert that OCFS is entitled to immunity on both grounds. In the instant case, it is not necessary to delve into the complex and murky analysis of whether or not the state exercises sufficient control over the agency for it to be deemed an arm of the state[8] or the intended scope of the legislative

[8] While it is clear that the state legislature and courts are arms of the state, classifying inferior subdivisions or agents can be exceedingly difficult. See Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law An Analysis of Principles and Their Application, ¶ 224 (b) (2002). Despite the intuitive sense that OCFS acts as the state itself, it is not ipso facto entitled to state immunity. "[T]he issue must ultimately depend on whether the sovereign power of the state is so involved in the organization and operation of the entity as to directly implicate the fundamental policy of federalism secured by the Eleventh Amendment." Daniel v. Am. Bd. of Emergency Med., 988 F. Supp. 127, 153 (W.D.N.Y. 1997) (citations omitted.)

> [T]he court [must] assess whether the entity constitutes an arm of a state by evaluating the

regulatory authority conferred on agency.[9] Even if

> degree of control and supervision over the entity, including the state's power of appointment and removal of officers or directors, any authority to approve or disapprove the actions of the entity, including its capacity to raise revenue for its own purposes, whether the entity is financially independent from the state, whether the state is responsible for the entity's obligations and liabilities, and the character of its functions, i.e., state-wide or local, are performed or served by the entity.
> Id. at 151-152.

The state defendants point to legislation granting OCFS extensive regulatory power, the fact that the Governor appoints the commissioners of OCFS and DSS, and cite Automated Salvage Transport, Inc. v. Wheelabrator Env'tl Sys.,155 F.3d 59, 70 (2d Cir. 1998) and Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 61(1994), in arguing for immunity.

A broad legislative grant of extensive regulatory power is not an obviously controlling factor. OCFS's powers do not seem more extensive than the home rule powers of municipalities, and those entities are not immune on that ground. Neither Hess or Wheelabrator offer much guidance. OCFS is clearly different from the bi-state agency operating a commuter railroad between states and the solid waste authority that maintains a vast system of solid waste management projects that were at issue in Hess and Wheelabrator. The nature of the activity is different, as is the extent of both government control and agency accountability to the public

[9] When a state agency, municipality, or other state subdivision claims state immunity from federal law, it must first identify a 'clearly expressed state policy' that authorizes its actions." Cine 42nd Street Theater Corp. v. Nederlander

OCFS was not immune under the Eleventh Amendment, plaintiffs have failed to state an antitrust claim under Fed. R. Civ. P. 12(b)(6). See Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law An Analysis of Principles and Their Application, ¶ 224 (2002) (noting that many antitrust allegations, like exclusive contracting, against state

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Organization, Inc., 790 F.2d 1032, 1043 (2d Cir 1986) (quoting Hallie, 105 S.Ct. at 1717). "The clarity of such policy is often a function of how broadly the legislation is drawn, with the existence of such policy being more readily discernible in narrowly drawn legislation. The legislation must contain an affirmative showing of intent, though it need do no more than authorize the challenged conduct." Id. (quoting Southern Motor Carriers Rate Conference v. United States, 105 S.Ct. 1721, 1729 (1985)).

As related above, OCFS is charged with broad powers of operation and regulation which have allegedly had anticompetive effects. An "adequate state mandate for anticompetitive activities . . . exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the [state] legislature contemplated the kind of action complained of.'" Wheelabrator, 155 F.3d at 69. (citations omitted).

In areas of zoning, economic development or regulation of commercial entities in regional areas to solve environmental problems, it is easy to infer that exercise of the agency's mandate will result in displacement of competitors. Here, under a plain reading, the legislation reveals the state's concern, and subsequent policy, that child care providers receive sufficient training in restraint techniques. While it may easily be inferred that the state is neutral or indifferent to the means by which this is accomplished, it is not the sort of mandate which leads to an inference that the state intends to trump federal antitrust policy.

sub-divisions will not violate anti-trust law, and where the substantive antitrust issue is clear, the logic of courts bypassing the state action question altogether).

2. Market Definition

"The essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms to prevent dismissal of the complaint on a defendant's 12(b)(6) motion." Found. for Interior Design Educ. Research v. Savannah College of Art & Design, 244 F.3d 521, 530 (6th Cir. 2001). "While the pleading standard under the federal rules is very liberal . . . the price of entry, even to discovery, is for the plaintiff to allege a factual predicate concrete enough to warrant further proceedings, which may be costly and burdensome." Id. (citation omitted.) "It is well-settled that an antitrust complaint must allege a relevant market in which the anti-competitive effects of the challenged activity can be assessed." Evac, LLC v. Pataki, 89 F.Supp.2d 250, 260-61 (N.D.N.Y. 2000) (citing Jefferson Parish Hospital. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984)).

"In order to survive a motion to dismiss, a claim under the Sherman Act §§ 1 and 2, 15 U.S.C.S. §§ 1 and 2, must allege a relevant geographic and product market in which trade was unreasonably restrained or monopolized." Global Discount Travel Servs., LLC v. TWA, 960 F. Supp. 701 (S.D.N.Y. 1997); Jefferson Parish, 466 U.S. at 29; In re NASDAQ Market-Makers Antitrust Litig., 894 F. Supp. 703, 710-711 (S.D.N.Y. 1995). Otherwise, "it is impossible for a court to assess the anticompetitive effect of challenged practices." Re-Alco Industries, Inc. v. National Center for Health Educ., Inc., 812 F. Supp. 387, 392 (S.D.N.Y. 1993).

Accordingly, failure to define the relevant market constitutes grounds for dismissal. Discon Inc. v. Nynex Corp., 86 F. Supp. 2d 154, 161 (W.D.N.Y. 2000).

Plaintiffs argue that they have properly defined a relevant market, but first, that they are free from the burden of engaging in market analysis to demonstrate the effect of defendant conduct on the market because they have asserted per se claims. A per se claim is alleged when the alleged conduct falls within a "narrow range of behavior that is considered so plainly anti-competitive and so lacking in redeeming pro-competitive value that it is 'presumed illegal without further examination,' that is, it is illegal per se." Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 506 (2d Cir. 2004) (quoting Broad. Music, Inc. v. Columbia Broadcast System, Inc., 441 U.S. 1, 8 (1979)). It is true that claims of per se violations of the Sherman Act relieve plaintiffs of demonstrating anticompetitive effects under the burdensome multi-part rule of reason analysis applied to most claims. Id. at 507. However, plaintiffs cannot avoid the burden of meeting the standing requirement of alleging injury to competition, not simply injury to HWC, which, here, requires a properly defined market. See Discon, 86 F. Supp. 2d at 159 (citing Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 341-44 (1990)); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977)).

Moreover, plaintiffs have not alleged a per se violation of the Sherman Act. That characterization is applied to a short list of violations which generally includes naked horizontal price fixing, market allocation and output restrictions. See Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 62 (1st Cir. 2004). As will be

explained below, plaintiffs' allegations amount to a claim of illegal exclusive contracting, which is not a per se violation because such arrangements are frequently found to benefit competition. Id. at 62; Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 508 (2d Cir. 2004).

Turning to plaintiffs' definition of the relevant market. The complaint does not specifically purport to define the relevant market, but repeatedly refers to "training services to New York State child care providers." (Complaint at ¶¶ 90, 91, 95.) Plaintiffs' construction of the market is based on child care providers' need for state certification which involves OCFS's approval of a particular service provider.

On a motion to dismiss, the allegations complaint are taken as true and it is therefore presumed that OCFS refuses to grant approval of physical restraint programs other than TCI. OCFS therefore effectively exercises the child care providers' market choice in service providers. But then, it was OCFS that created the need for certification. At oral argument, plaintiff referred to the relevant market as the "OCFS market." This is not a proper antitrust market as it is defined in terms of the purchase(s) of a single -buyer, OCFS. See International Logistics Group, Ltd. v. Chrysler Corp., 884 F.2d 904, 909 (6th Cir. 1989); Discon, 86 F. Supp. 2d at 160. "[T]o define the relevant product market as that group of products over which defendants' anticompetitive conduct exercises control, . . . as an analytic matter, reads the market definition step out of the Sherman Act. " Discon, 86 F. Supp. 2d at 161 (citation omitted). Any anticompetitive effect resulting from allegedly biased purchasing decisions in the market must reflect

the total demand for restraint services as a whole, not just OCFS's demand.

Plaintiffs have not alleged that there is anything particular in the provision of training to OCFS child care providers such that OCFS' training needs and/or materials should constitute a market in and of itself. It is not that Cornell defendants have monopolized the "OCFS certification required market", but rather that OCFS, as a participant or consumer in the restraint services market, has simply entered into an exclusive contract with Cornell defendants. Absent some compelling reason to adopt plaintiffs' market construction, the agreement must be evaluated in the terms of the restraint services market as a whole.

Plaintiffs have not properly defined a relevant product market but rather have defined the product to meet plaintiffs' definition of the OCFS market. The market for physical restraint programs includes social service agencies, law enforcement agencies, correctional facilities, educational institutions, and even airlines. Some portion of the program consists of behavior management techniques which may or may not be distinguishable from use of force techniques. It is also apparent that the restraint techniques are not strictly applicable to children.

Because the product market has been defined to include only the purchases of OCFS it is not possible to evaluate the effect of the OCFS and TCI arrangement on other service providers or consumers. "The relevant product market includes all products reasonably interchangeable, determination of which requires consideration of cross-elasticity of demand." Re-Alco, 812 F.Supp. at 391. "In the context of a Fed. R. Civ. P. 12(b)(6) motion to dismiss, an antitrust complaint must either allege facts regarding

substitute products, distinguish among comparable products, or allege facts relating to cross-elasticity of demand; otherwise, dismissal is appropriate." Intellective, Inc. v. Mass. Mut. Life Ins. Co., 190 F. Supp. 2d 600 (S.D.N.Y. 2002).

Plaintiffs have not offered any theoretically reasonable explanation for restricting the product market to child care providers that require OCFS approval, or provided a sufficient factual predicate to support an inference that OCFS enjoys any substantial market power in the broader market for restraint services. This failure is fatal to their antitrust claims. See Evac, LLC v. Pataki, 89 F.Supp.2d 250, 260-61 (N.D.N.Y. 2000).

Plaintiffs' pleading of a geographic market is also fatally insufficient. Here, plaintiffs have narrowed the geographic market to child care providers in New York State, yet even plaintiffs seem constrained by that definition. Plaintiffs state that their customer base, child care providers, are national consumers of training services. (Complaint at ¶ 93.) Plaintiffs also note that HWC competes for national and international training contracts. Id. at ¶¶ 93, 98. Yet, plaintiffs have not attempted to describe a market in which defendants are affecting training services in a national market, let alone international market. The actual economic reality of the relevant market is no doubt larger than New York State and smaller than the entire international market, but plaintiffs have not provided sufficient facts to support any particular inference as to what it might be. See Evac., 89 F.Supp.2d at 261.

The antitrust claims will be dismissed as plaintiffs have failed to define a proper product or geographic market.

D. State Law Claims

"Pursuant to 28 U.S.C. § 1367(c)(3), a district court may decline to exercise supplemental jurisdiction over state law claims where 'the district court has dismissed all claims over which it has original jurisdiction.'" Manhattan Telecomms. Corp. v. DialAmerica Mktg., 156 F. Supp. 2d 376, 384 (S.D.N.Y. 2001). Considering that the federal claims in this action are eliminated at the early pleading phase of the litigation, supplemental jurisdiction of the remaining state laws claims is declined, and those claims will be dismissed without prejudice. See Valencia v. Sung M. Lee, 316 F.3d 299, 305 (2d Cir. 2003) (citing 28 U.S.C. § 1367(c)); Martinez v. Simonetti, 202 F.3d 625, 636 (2d Cir. 2000) (directing dismissal of supplemental state law claims where no federal claims remained).

IV. CONCLUSION

Plaintiffs' copyright claim is not supported by sufficient facts alleging that the state defendants reproduced copyrighted materials without a license or authorization. Plaintiffs failed to adequately define a market to support the antitrust claims.

Therefore, it is

ORDERED that

1. Defendants' motions to dismiss the complaint are GRANTED;

2. The complaint is DISMISSED in its entirety, the First, Seventh, and Eighth causes of action stating federal claims are dismissed with prejudice, and, the remaining causes of action

stating state law claims are dismissed without prejudice.

The Clerk of the Court is directed to enter judgment accordingly.

IT IS SO ORDERED.

Dated: September 29, 2005
Utica, New York.

United States District Court

U. S. DISTRICT COURT
N. D. OF N. Y.
FILED

SEP 29 2005

AT _____ O'CLOCK ____M
LAWRENCE K. BAERMAN, Clerk
UTICA

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: October 25, 2007 Decided: October 14, 2008)

Docket No. 05-7010-cv

BRUCE CHAPMAN AND HANDLE WITH CARE BEHAVIOR MANAGEMENT SYSTEM, INC.,

Plaintiffs-Appellants,

—v.—

NEW YORK STATE DIVISION FOR YOUTH, NEW YORK STATE OFFICE OF CHILDREN & FAMILY SERVICE, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, JOHN JOHNSON, Commissioner of New York State Office of Children and Family Services, and former Commissioner of the New York State Division for Youth, in his official and individual capacity, MARGARET DAVIS, former Director of Training for the New York State Division for Youth, and former Director of Training for New York State Office of Children and Family Services, in her official and individual capacity, PATSY MURRAY, former Associate Training Technician for the New York State Division for Youth, and current position as Trainer for New York State Office of Children and Family Services, in her official and individual capacity, CORNELL UNIVERSITY, JEFFREY LEHMAN, President of Cornell University, in his official and individual capacity, DOCTOR HUNTER RAWLINGS, III, former President of Cornell University, in his official and individual capacity, NEW YORK STATE COLLEGE OF HUMAN ECOLOGY, FAMILY LIFE DEVELOPMENT

CENTER, RESIDENTIAL CHILD CARE PROJECT, THERAPEUTIC CRISIS INTERVENTION, MARTHA HOLDEN, Project Director of the Residential Child Care Project and Therapeutic Crisis Intervention Trainer and Coordinator, in her official and individual capacity, MICHAEL NUNNO, Project Director of the Residential Child Care Project and Therapeutic Crisis Intervention Trainer and Coordinator, in his official and individual capacity, HILLSIDE CHILDREN'S CENTER, DENNIS RICHARDSON, President and CEO of Hillside Children's Center, in his official and individual capacity, DOUGLAS BIDLEMAN, Employee of Hillside Children's Center and Therapeutic Crisis Intervention Trainer, in his official and individual capacity,

Defendants-Cross-Defendants-Appellees.

Before:

WALKER, STRAUB, and POOLER, *Circuit Judges.*

Plaintiffs-appellants seek review of an order of the United States District Court for the Northern District of New York (David N. Hurd, *Judge*) dismissing their copyright and antitrust claims pursuant to Fed. R. Civ. P. 12(b) and (c) and declining to exercise supplemental jurisdiction over their state law claims. The district court dismissed plaintiffs' copyright claims on the basis that a contract unambiguously granted the defendants a perpetual license to copy plaintiffs' materials. We conclude that the contract is ambiguous, and remand the case for further fact-finding on this issue. With regard to plaintiffs' antitrust claims, we agree with the district court that plaintiffs have failed to allege a plausible antitrust market. We therefore affirm the district court's order dismissing plaintiffs' antitrust claims with prejudice.

AFFIRMED in part; VACATED and REMANDED in part.

GUY L. HEINEMANN, Guy L. Heinemann, P.C. (Irene M. Vavulitsky, Guy L. Heinemann, P.C., and Hilary Adler, Law Offices of Hilary Adler, Gardiner, N.Y., *on the brief*), New York, N.Y., *for Plaintiffs-Appellants.*

ANDREA OSER, Assistant Solicitor General (Daniel Smirlock, Deputy Solicitor General, *on the brief*), for Eliot Spitzer, Attorney General of the State of New York, Albany, N.Y., *for Defendants-Appellees, New York State Division for Youth, New York State Department of Social Services; New York State Office of Children & Family Services, John Johnson; Margaret Davis, and Patsy Murray.*

NELSON E. ROTH (Valerie L. Cross and Norma W. Schwab, *on the brief*) Office of the University Counsel, Ithaca, N.Y., *for Defendants-Appellees, Cornell University, Jeffrey Lehman, Hunter Rawlings, III, New York State College of Human Ecology, Family Life Development Center, Residential Child Care Project, Therapeutic Crisis Intervention, Martha Holden, and Michael Nunno.*

DAVID H. WALSH, Petrone & Petrone, P.C., Syracuse, N.Y., *for Defendants-Appellees, Hillside Children's Center, Dennis Richardson, and Douglas Bidleman.*

JOHN M. WALKER, JR., *Circuit Judge*:

Plaintiffs-appellants Bruce Chapman and Handle With Care Behavior Management System, Inc., (collectively "HWC") market a training program ("Handle With Care") that teaches individuals a safe technique for physically restraining others. HWC sued three

groups of defendants alleging generally that they had infringed HWC's copyright and adversely affected the market for such restraint services in violation of the antitrust laws.

Specifically, HWC sued various New York state agencies and their officers and agents (collectively "the state defendants"). The state defendants include: the New York State Office of Children and Family Services ("OCFS"), which in 1998 succeeded the New York State Division for Youth ("DFY") and the New York State Department of Social Services ("DSS") also named as defendants; John Johnson, the former Commissioner of DFY and the current Commissioner of OCFS; Margaret Davis, the former Director of Training for DFY and the current Director of Training for OCFS; and Patsy Murray, a former Associate Training Technician for DFY and current Trainer for OCFS.

HWC also sued Cornell University and the New York State College of Human Ecology (the "College") and related persons and entities (collectively "the Cornell defendants"). The Cornell defendants include: Cornell University; Jeffrey Lehman, Cornell's then-current president; Hunter Rawlings III, Cornell's former president; the College and subsidiaries the Family Life Development Center, the Residential Child Care Project, and Therapeutic Crisis Intervention ("TCI"); and Project Directors of the Residential Child Care Project and TCI Trainers and Coordinators, Martha Holden and Michael Nunno.

Finally, HWC sued Hillside Children's Center ("HCC"), a private childcare provider and residential treatment center, and two of its officers, Dennis Richardson, HCC's president, and Douglas Bidleman, HCC's Coordinator for Sociotherapy (collectively "the Hillside defendants").

The state and Cornell defendants moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), and the Hillside defendants moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(c). The district court granted both motions as to all of plaintiffs' federal claims and declined to exercise supplemental jurisdiction

over the remaining state law claims. The federal claims dismissed were: (1) copyright infringement against the state defendants; and (2) conspiracy to monopolize and restrain trade, together with monopoly, restraint of trade, and unfair competition, against all defendants.

The district court dismissed plaintiffs' copyright claim on the basis that the contract at issue unambiguously granted the state defendants the right to copy plaintiffs' materials indefinitely. We disagree with that conclusion, find the contract ambiguous, and remand the case to the district court to determine the duration of the license to copy plaintiffs' materials granted under the contract.

With regard to the antitrust claims, the district court held that the plaintiffs failed to offer a plausible relevant market in which the defendants monopolized the trade for restraint services or engaged in restraint of trade or unfair competition with respect thereto. We agree that the plaintiffs have failed to define a plausible market and conclude that the plaintiffs cannot establish that the defendants have substantial market power in the market for restraint services properly defined. Accordingly, we affirm the district court's dismissal of plaintiffs' antitrust claims and vacate the district court's dismissal of the copyright claim against the state defendants.

BACKGROUND

For purposes of reviewing a motion to dismiss, we assume the accuracy of the plaintiffs' allegations in their complaint. *Patane v. Clark*, 508 F.3d 106, 111 (2d Cir. 2007) (per curiam). "[O]ur review is limited to undisputed documents, such as a written contract attached to, or incorporated by reference in, the complaint." *Official Comm. Of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, L.L.P.*, 322 F.3d 147, 160 n.7 (2d Cir. 2003) (citing *Cortec Indus., Inc. v. Sum Holding, L.P.*, 949 F.2d 42, 47 (2d Cir. 1991)).

OCFS (previously DFY and DSS) operates juvenile facilities and monitors child care providers in the state of New York. The New York legislature mandated that OCFS:

> promulgate regulations concerning standards for the protection of children in residential facilities and programs operated or certified by the division, from abuse and maltreatment . . . Such standards shall . . . establish as a priority that: . . . administrators, employees, volunteers and consultants receive training in . . . : the characteristics of children in care and techniques of group and child management including crisis intervention.

N. Y. Exec. Law § 501(12); *see also* N.Y. Soc. Serv. Law § 462(1)(c). To that end, state regulations require that each supervised child care facility "submit[ ] its restraint policy to [OCFS]" and prohibit the use of "any method of restraint unless it has . . . been approved in writing by [OCFS]." 18 N.Y. Comp. Codes R. & Regs. § 441.17(c).

In 1987, New York State purchased HWC's method for use in its own facilities. That year, DFY contracted with HWC to provide training in HWC's methods to its staff (the "1987 contract"). The 1987 contract provided that HWC would train 120 DFY staff members over fifteen days in HWC's methods. It further provided that HWC would furnish DFY with one "copy of Handle With Care (copyrighted) which [DFY] may reproduce in whole or in part as required by [DFY]" and "a videomaster of the restraint program to be used by [DFY's] master trainers in conducting training programs for facility staff." Finally, the contract stated that "[t]his agreement shall commence January 1, 1988 and end March 31, 1988." There is no dispute that HWC fulfilled its obligations under the 1987 contract and trained 120 DFY staff, some of whom were master trainers, during the relevant three-month term. In 1997, however, after two incidents at DFY facilities in which children were harmed by the use of improper restraint techniques, DFY requested that HWC provide retraining to its staff.

The resulting contract (the "1997 contract") provided that HWC would "update and recertify existing [DFY] Crisis Management/Physical Restraint trainers in the techniques encompassed in the *Handle With Care* program;" that it would "deliver twelve (12)

days of training to approximately one hundred twenty (120) existing [DFY] trainers;" and that DFY had "the right to reproduce all training materials."[1] The contract provided that the "agreement shall commence May 1, 1997 and end August 31, 1997." Additionally, HWC required DFY staff members to sign individual contracts acknowledging that their certification to train in HWC's methods terminated after one year.

HWC furnished the training and materials in conformity with the 1997 contract. Thereafter, there is no dispute that DFY master trainers, using HWC's materials, trained the rest of DFY's staff in the HWC method. A year later, DFY merged into OCFS and the latter continued to use HWC's materials to train its staff.

HWC faced competition in the restraint method and training business. Cornell, in partnership with the State of New York, developed and marketed its own restraint method and training services called Therapeutic Crisis Intervention ("TCI"). HWC and TCI competed in providing restraint training services to various agencies, organizations, and businesses.

Sometime after DFY merged with OCFS in 1998, OCFS began to withhold its approval of each facility's restraint method unless the TCI method was used. After learning of the alleged policy change at OCFS, HWC filed the instant action challenging the policy, claiming that OCFS, Cornell, and HCC conspired to monopolize the market for restraint services in violation of the antitrust laws. HWC also claimed that OCFS infringed HWC's copyright by reproducing HWC's materials in 1998 and by continuing to use them and made various state law claims. After the district court dismissed these claims, HWC appealed.

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[1] We note that, as defendants acknowledge on appeal, the district court was mistaken in its view that the contract was "drafted by Chapman."

DISCUSSION

I. Legal Standard

We review *de novo* the dismissal of a complaint for failure to state a claim, and accept all well-pleaded facts as true and consider those facts in the light most favorable to the plaintiff. *Patane v. Clark*, 508 F.3d 106, 111 (2d Cir. 2007) (per curiam).

> To survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.' Once a claim has been adequately stated, it may be supported by showing any set of facts consistent with the allegations in the complaint.

ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007) (quoting *Bel' Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007)).

II. The Copyright Claim

HWC's copyright claim against the state defendants is dependent upon the terms of the 1997 contract. There is no dispute that DFY copied HWC's materials; the only question is whether DFY had the right to do so. *See Graham v. James*, 144 F.3d 229, 236 (2d Cir. 1998) ("A copyright owner who grants a nonexclusive license to use his copyrighted material waives his right to sue the licensee for copyright infringement."). "In interpreting a contract, the intent of the parties governs. A contract should be construed so as to give full meaning and effect to all of its provisions." *Am. Express Bank Ltd. v. Uniroyal, Inc.*, 562 N.Y.S.2d 613, 614 (N.Y. App. Div. 1990) (citations omitted). The question of whether a provision in an agreement is ambiguous is a question of law. *Collins v. Harrison-Bode*, 303 F.3d 429, 433 (2d Cir. 2002). Under New York law, the presence or absence of ambiguity is determined by looking within the four corners of the document, without reference to extrinsic evidence. *Kass v. Kass*, 696 N.E.2d 174, 180

(N.Y. 1998). "[A]n ambiguity exists where a contract term could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *World Trade Ctr. Props., L.L.C. v. Hartford Fire Ins. Co.*, 345 F.3d 154, 184 (2d Cir. 2003) (internal quotation marks and citation omitted).

We must decide whether the 1997 contract is ambiguous as to the duration of the license granted to copy HWC's materials. Although both parties contend that the 1997 agreement is unambiguous on its face, they draw different conclusions as to the duration of the license. HWC claims that, according to the 1997 contract's "Term of Agreement" provision, DFY's right to copy its materials ended on August 31, 1997 (120 days after the agreement commenced). The state defendants, however, contend that the 1997 contract unambiguously grants DFY a perpetual right to copy HWC's materials. The district court agreed with the state defendants. We disagree and conclude that the contract on its face is ambiguous.

The purpose of the 1997 contract is not disputed: HWC agreed to "update and recertify existing [DFY] Crisis Management/Physical Restraint trainers in the techniques encompassed in the *Handle With Care* program." To that end, the agreement provided that HWC would perform twelve days of training to DFY trainers. The DFY trainers would then train the rest of DFY's staff in HWC's methods. Contemplating that the DFY trainers would need to utilize HWC's materials in training the rest of the Division staff, the 1997 contract acknowledged that "[DFY] has the right to reproduce all training materials."

HWC's argument that the license to copy its materials expired after 120 days conflicts with the agreement's purpose. While the 1997 contract states that the "agreement shall commence May 1, 1997 and end August 31, 1997," there is nothing in the contract that expressly indicates that this provision governs the duration of

the license to copy HWC's materials. Indeed, from the four corners of the agreement, it is not at all certain that the parties intended that DFY's rights to copy HWC's materials terminate so quickly. HWC plainly knew that it was training trainers who, if they were to train the rest of DFY's staff, would need to copy HWC's materials. The provision allowing use of HWC's materials is unclear on its face as to whether it was meant to end with the agreement, or whether it was meant to continue for a reasonable period of time after the agreement ended to allow for further training of DFY staff.

We are equally unpersuaded that the 1997 contract granted a perpetual license. There is no indication from the contract that the license to copy HWC's materials was meant to be perpetual. And under New York law, "[c]ontracts which are vague as to their duration generally will not be construed to provide for perpetual performance." *Ketcham v. Hall Syndicate, Inc.*, 236 N.Y.S.2d 206, 214 (N.Y. Sup. Ct. 1962). In the absence of a clear provision, courts are reluctant to declare a perpetual license as a matter of law. *See Warner-Lambert Pharm. Co. v. John J. Reynolds, Inc.*, 178 F. Supp. 655, 661 (S.D.N.Y. 1959), *aff'd*, 280 F.2d 197 (2d Cir. 1960) (per curiam). Because the contract here does not explicitly grant a perpetual license, we do not find that it did so.

After rejecting both parties' arguments and finding no plausible alternative within the four corners of the document, we conclude that the 1997 contract is ambiguous as to the duration of the license. This leaves us two choices. "We may resolve [the] ambiguity . . . if there is no extrinsic evidence to support one party's interpretation of the ambiguous language or if the extrinsic evidence is so one-sided that no reasonable factfinder could decide contrary to one party's interpretation. Or, we may remand for the trial court to consider and weigh extrinsic evidence to determine what the parties intended." *Collins*, 303 F.3d at 433 (internal quotation marks and citation omitted). We choose the latter.

The extrinsic evidence presently in the record does not answer the question. HWC points out that when it provided retraining in 1997, it required each Division trainer to sign a contract acknowl-

edging that his/her certification expired after one year. This evidence would support a finding that the license granted under the 1997 contract was of a more limited duration. The evidentiary record, however, is incomplete. Because further fact-finding is necessary, we remand the copyright claim to the district court for further proceedings consistent with this opinion.[2]

III. Plaintiffs Have Failed to Define the Proper Market for Antitrust Purposes

HWC claims that OCFS, in cooperation with Cornell, has conspired to create a monopoly in the market for "training services to private child care providers located within the State of New York" by withholding approval of supervised facilities that do not use the TCI method. HWC alleges that HCC was complicit in this arrangement because, after HWC trained HCC's staff in 2001, HWC discovered that one of HCC's training coordinators "appeared in TCI's training manual and video illustrating" HWC's proprietary methods.

For a monopoly claim "[t]o survive a Rule 12(b)(6) motion to dismiss, an alleged product market must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes -- analysis of the interchangeability of use or the cross-elasticity of demand, and it must be plausible." *Todd v. Exxon Corp.*, 275 F.3d 191, 200 (2d Cir. 2001) (internal quotation marks and citation omitted). "[T]he reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it" determine "[t]he outer boundaries of a product market." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Though "market definition is a deeply fact-intensive inquiry [and] courts [therefore] hesitate to grant motions to dismiss

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[2] Because the district court did not have occasion to reach the state defendants' Eleventh Amendment immunity defenses, and because the Eleventh Amendment would not, in any event, bar suit against OCFS officials and employees sued in their official capacity for injunctive relief, *Henrietta D. v. Bloomberg*, 331 F.3d 261, 287 (2d Cir. 2003), we do not need to reach this issue.

for failure to plead a relevant product market," *Todd*, 275 F.3d at 199-200, "[w]here the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted," *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir. 1997). Here we find that plaintiffs' proposed relevant market does not encompass all interchangeable substitute products. We therefore affirm the district court's dismissal of the antitrust claims.

HWC contends that the relevant market for our analysis here is the market for "restraint training services to private child care providers located within the State of New York." This definition is too narrow. HWC has failed to show how the market for restraint training services *to child care providers* is any different from the larger market for restraint training services to other businesses, agencies, and organizations. "Interchangeability implies that one product is roughly equivalent to another for the use to which it is put. . . ." *Queen City*, 124 F.3d at 437 (internal quotation marks and citation omitted). Plaintiffs do not contest that Handle With Care is marketed to and utilized by various organizations, institutions, and agencies that are not child care providers. Indeed, plaintiffs readily admit in their complaint that they compete for such contracts on a "national and international" basis. The unifying characteristic of this market is that each purchaser needs to restrain individuals, not just children.

Because "the reasonable interchangeability of use . . . between the product itself and substitutes for it" determines "[t]he outer boundaries of a product market," it is apparent that the proper market here is the larger market for restraint training services to businesses, agencies, and organizations with the need to safely restrain individuals of all ages, not the more limited market for child restraint services. *Brown Shoe*, 370 U.S. at 325. As the district

court noted, the larger market includes social service agencies, law enforcement agencies, correctional facilities, educational facilities, and even airlines.

Furthermore, we reject HWC's argument that because private child care providers in New York must have OCFS approval in order to operate, and thus that the market is specialized, it stated a plausible discrete relevant market. The relevant inquiry is not whether a private child care provider may reasonably use both approved and non-approved OCFS methods interchangeably, but whether private child care providers in general might use such products interchangeably. *See Queen City*, 124 F.3d at 438. HWC's proposed relevant market "clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff 's favor." *Id.* at 436. We thus agree with the district court that the "Plaintiffs have not offered any theoretically reasonable explanation for restricting the product market to child care providers that require OCFS approval, or provided a sufficient factual predicate to support an inference that OCFS enjoys any substantial market power in the broader market for restraint services." Plaintiffs' proposed market is therefore legally insufficient and dismissal of the antitrust claims was appropriate.[3]

CONCLUSION

For the foregoing reasons, the judgment below is AFFIRMED as to the antitrust claims and VACATED as to the copyright claim and the case is REMANDED to the district court for further proceedings consistent with this opinion.

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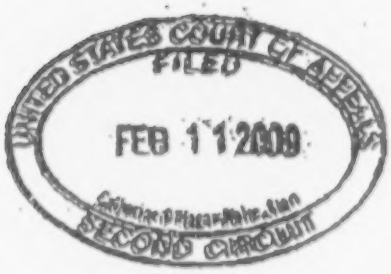
[3] HWC argues that the district court exceeded its allowable discretion in dismissing their antitrust claims with prejudice, as opposed to allowing HWC to amend their complaint. Given the nature of the claims, repleading would be futile; HWC offers no plausible argument as to how the failure to plead a relevant market could be rectified through an amended complaint. *See Patane v. Clark*, 508 F.3d 106, 113 n.6 (2d Cir. 2007) (per curiam).

APPENDIX C



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket Number: 05-7010-cv

ORDER

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 11th day of February, two thousand and nine,

Bruce Chapman and Handle with Care Behavior Management System, Inc,

Plaintiffs-Appellants,

v.

New York State Division for Youth; New York State Office of Children & Family Service, New York State Department of Social Services, John Johnson, Commissioner of New York State Office of Children and Family Services and former Commissioner of the New York State Division for Youth, in his official and individualy capacity, Margaret Davis, former Director of

Training for the New York State Division for Youth, and former Director of training for New York State Office of Children and Family Services, in her official and individual capacity., Patsy Murray, former associate Training Technician for the New York State Division for Youth, and current position as Trainer for New York State Office of Children and Family Services, in her official and individual capacity., Cornell University, Jeffrey Lehman, President of Cornell University, in his official and individual capacity, Doctor Hunter Rawlings, III, former President of Cornell University, in his official and individual capacity, New York State College of Human Ecology, Family Life Development Center, Residential Child Care Project, Therapeutic Crisis Intervention, Martha Holden, Project Director of the Residential Child Care Project and Therapeutic Crisis Intervention Trainer and Coordinator, in her official and individual capacity, Michael Nunno, Project Director of the Residential Child Care Project and Therapeutic Crisis Intervention Trainer and Coordinator, in his official and individual capacity: Hillside Children's Center, Dennis Richardson, President and CEO of Hillside Children Center, in his official and individual capacity, Douglas Bidleman Employee of Hillside Children's Center and Therapeutic Crisis Intervention Trainer, in his official and individual capacity,

Defendants-Cross-Defendants-Appellees.

Appellant Handle With Care Behavior Management Systems, Inc. having filed a petition for panel rehearing, or, in the alternative, for rehearing en bane, and the panel that determined the appeal having considered the request for panel rehearing, and thc active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O' Hagan Wolfe, Clerk

By: /s/
Frank Perez, Deputy Clerk

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(2)

No. 08-1410

Supreme Court, U.S.
FILED
OCT 5 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HANDLE WITH CARE BEHAVIOR MANAGEMENT SYSTEM, INC.,

Petitioner,

v.

NEW YORK STATE DIVISION OF YOUTH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR THE NEW YORK STATE RESPONDENTS

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COUNTER STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals properly affirm the dismissal of petitioner's claim under § 1 of the Sherman Act, where petitioner effectively conceded it was required to identify a relevant market in which any anticompetitive effects could be assessed, but failed to do so?

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COUNTER STATEMENT OF FACTS

1. Respondent New York State Office of Children and Family Services ("OCFS") is a state agency that supervises foster care, regulated child care, adoption services, and other New York programs for the welfare and safety of children. N.Y. State Office of Children & Family Servs., *About the New York State Office of Children and Family Services (OCFS)*, *available at* http://www.ocfs.state.ny.us/main/about (last visited Oct. 1, 2009).

This case centers on OCFS's regulatory oversight of "voluntary authorized agencies" – also called "private foster agencies" or "PFAs" – which are private entities that care for or arrange for the care of children or placement of children in foster care. *See* N.Y. Soc. Serv. Law § 371(10)(a); 18 N.Y. Comp. Codes R. & Regs. ("N.Y.C.R.R.") § 441.2(b). PFAs in New York operate subject to "the approval, visitation, inspection and supervision of [OCFS] as to any and all acts in relation to the welfare of children." N.Y. Soc. Serv. Law § 371(10)(a). OCFS approves PFAs' certificates of incorporation and issues operating certificates for any child residential facilities they are permitted to run. *See id.* §§ 371(16), (17); 460-a–c; 18 N.Y.C.R.R. § 441.2(f)-(I); pts. 442, 447, 448.

New York Social Services Law § 462(1)(a) authorizes OCFS to "promulgate regulations concerning standards of care and treatment . . . which shall apply to all facilities exercising care or custody of children." Those standards must "establish as a priority" that facility personnel receive training in, among other things, "safety and

security procedures" and "techniques of group and child management, including crisis intervention." *Id.* § 462(1)(c)(I).

Pursuant to § 462, OCFS has promulgated a regulation governing PFAs' use of "restraints" – defined as "containment of acute physical behavior by physical, mechanical, or pharmacological intervention, or room isolation." 18 N.Y.C.R.R. § 441.17(a)(1). The regulation requires that, before using any method of restraint, a PFA must submit a detailed restraint policy for written approval by OCFS. *Id.* § 441.17(c)-(d). That approval lasts for two years, and a PFA may not change its restraint policy in the interim without further approval by OCFS. *Id.* A qualifying restraint policy must describe, among other things, (1) preventive methods for avoiding situations that may lead to use of restraints; (2) alternatives to use of restraints; (3) the circumstances when use of restraints may be necessary; (4) methods of and rules for applying restraints; and (5) the training that staff will receive in the use of restraints. *Id.* § 441.17(d)(1). The regulation mandates that PFA staff must receive at least six hours of initial training in the above elements of the restraint policy and complete a review of the training every six months. *Id.* § 441.17(h).

2. Petitioner Handle With Care Behavior Management System ("HWC") "provid[es] crisis intervention services" nationally and internationally to mental health and social services agencies, child and adult residences, schools, juvenile justice facilities, law enforcement agencies, adult correctional facilities, and event and concert organizers (2d Cir. Joint Appendix ["J.A."] 26, 235). Its services include providing training in the use of restraints (*see* J.A. 29-30).

In this lawsuit, HWC alleges that OCFS will not allow PFAs to use HWC to develop restraint policies and provide staff training. HWC contends that OCFS has permitted PFAs to use only the restraint policy of a single vendor – a policy called "Therapeutic Crisis Intervention" or "TCI" that was developed by respondent Cornell University with state and federal grants (J.A. 39-40). The complaint alleges that the State of New York pays for the training services that Cornell provides to PFAs, and that "TCI is currently charging New York State 4-10 times the rate that it charges for identical services provided to out-of-state customers" (J.A. 31-32, 40).[1] HWC asserts that the State tolerates the higher charges because it recoups most of the cost through federal grants and matching funds (J.A. 31-32, 40; *see also* Pet. at 8).

The complaint asserts claims under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (J.A. 26),[2] alleging, on information and belief, that OCFS and the other named defendants "have illegally coerced a monopoly control over crisis intervention, behavior management

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1. HWC asserts in its petition, without any support, that PFAs absorb the cost of training through budget reductions (Pet. at 8), but that is not alleged in the complaint. To the contrary, the complaint alleges that the State pays for the training services (J.A. 31, 40).

2. Section 1 of the Sherman Act makes unlawful "[e]very contract, combination, in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several States." Section 2 makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."

and restraint training services to private child care providers" in New York (J.A. 40). The complaint further alleges, on information and belief, that all named defendants "knew, participated in, acquiesced, benefited from or accepted the plan" by which TCI was given this "exclusive monopoly" (J.A. 41). HWC alleges it has suffered injury because defendants' conduct affects its "ability to fairly compete for national and international training contracts" for crisis intervention and use of restraints (J.A. 41).

3. By memorandum decision and order dated September 29, 2005 (Pet. App. 1a-26a), the district court dismissed the complaint in its entirety.[3] The district court declined to reach defendants' argument that the antitrust claims, by challenging OCFS's regulatory actions, were barred by state-action immunity (Pet. App. 15a-20a). The court instead ruled that the claims failed because the complaint failed to support an inference that OCFS possessed power in the market for restraint services as a whole, and thus OCFS's alleged exclusive use of TCI to provide training services to PFAs could not possibly harm competition in the relevant market (Pet. App. 20a-24a).

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3. While the petition does not involve these claims, the complaint also asserts state-law claims and a federal copyright claim based on separate allegations that OCFS and its predecessor agencies unlawfully used copyrighted training materials owned by HWC's principal. In addition to dismissing the antitrust claims, the district court dismissed the copyright claim with prejudice and declined to exercise supplemental jurisdiction over the state-law claims (*see* Pet. App. 11a-13a, 25a). The Second Circuit reversed the dismissal of the copyright claim and remanded that claim to the district court for further proceedings (*see* Pet. App. 34a-37a, 39a).

The trial court first rejected plaintiff's argument that the complaint stated a per se violation of the Sherman Act (Pet. App. 21a-22a). The court concluded that plaintiff's allegations that OCFS would authorize and reimburse PFAs for TCI alone "amount to a claim of illegal exclusive contracting, which is not a per se violation because [exclusive dealing] arrangements are frequently found to benefit competition" (Pet. App. 22a).

Applying a Rule of Reason analysis, the district court held that the complaint improperly restricted the relevant product and geographic markets to the provision of "training services to New York State child care providers" licensed by OCFS (Pet. App. 22a [quoting J.A. 40, 41]). The court observed that the restraint techniques at issue did not apply only to children and therefore the relevant market was not limited to those "child care providers that require OCFS approval" (Pet. App. 24a). The district court held that the relevant market was properly defined as "the restraint services market as a whole" – including child care providers, social service agencies, law enforcement agencies, correctional facilities, educational institutions, and even airlines, all of which could benefit from knowledge of use-of-force techniques (Pet. App. 23a). According to the district court, "[a]ny anticompetitive effect resulting from allegedly biased purchasing decisions in the market must reflect the total demand for restraint services as a whole, not just OCFS's demand" (Pet. App. 22-23a). The court dismissed the complaint because it did not "provide[] a sufficient factual predicate to support an inference that OCFS enjoys any substantial market power in the broader market for restraint services" (Pet. App. 24a).

The district court also held that the complaint's "pleading of a geographic market" was insufficient (Pet. App. 24a). While HWC sought to restrict the focus to New York State alone, the court noted that HWC's own complaint showed that both HWC and Cornell marketed their training services far more broadly – alleging, for example, that the relevant customer base was "national consumers of training services" and that HWC "compete[d] for national and international training contracts" (Pet. App. 24a). It was unclear how OCFS's regulatory power in New York could affect the national or international market for restraint training contracts.

4. The court of appeals affirmed the dismissal of the antitrust claims, holding that the complaint failed to specify a relevant market and show market power sufficient to support an antitrust monopoly claim (Pet. App. 37a-39a). The appeals court agreed with the district court that HWC had not justified limiting the relevant market to New York child-care providers that require OCFS approval for their restraint policies, and had not pleaded facts creating a reasonable inference that OCFS possessed power in the broader market for restraint services (Pet. App. 39a). The court of appeals held that HWC "failed to show how the market for restraint training services *to child care providers* is any different from the larger market for restraint training services to other businesses, agencies, and organizations" (Pet. App. 38a). The appeals court further noted that plaintiff did not "contest that Handle With Care is marketed to and utilized by various organizations, institutions, and agencies that are not child care providers" and "readily admit[ted] in their complaint that they compete for such contracts on a

'national and international' basis" (Pet. App. 38a). The Second Circuit also found that it would be futile to give HWC an opportunity to replead because it had "offer[ed] no plausible argument as to how the failure to plead a relevant market could be rectified through an amended complaint" (Pet. App. 39a n.3).

REASONS FOR DENYING THE PETITION

Throughout this litigation, plaintiff has shifted its theory of antitrust liability in search of one that can survive dismissal. Its petition to this Court is no exception. The focus of plaintiff's complaint is its allegation that OCFS granted Cornell an unlawful monopoly actionable under § 2 of the Sherman Act. The petition raises no issue concerning § 2 liability, however. In the court of appeals, HWC argued mainly that its claims under § 1 should survive because the complaint properly defined a relevant market (the market for training OCFS-licensed New York child-care providers) and alleged OCFS's power within that market. But the petition does not raise those arguments either.

Now that the court of appeals has correctly rejected those arguments, HWC changes course once again. Its petition for certiorari raises a single question that it did not timely present to the court of appeals: whether detailed market analysis is unnecessary under § 1 where a complaint sufficiently alleges direct anticompetitive effects. The petition should be denied, first and foremost, because HWC did not preserve that question, the Second Circuit therefore did not purport to decide it, and plaintiff's complaint does not plausibly allege direct anticompetitive effects in any event.

Moreover, contrary to HWC's arguments, no circuit split exists on the question whether detailed market analysis is unnecessary where a complaint sufficiently pleads direct anticompetitive effects: all of the courts of appeals to have addressed the question, including the Second Circuit, have held that it is. Finally, even if the petition presented a certworthy question regarding the role of market analysis in Rule of Reason cases, and it does not, the question would not be reached on review here because HWC's claims are barred at the threshold by the doctrine of state-action antitrust immunity.

I. HWC Failed to Preserve the Issue Presented in the Petition, An Issue that Would Not Have Saved Its Complaint from Dismissal.

HWC did not timely present in the courts below the issue whether detailed market analysis is unnecessary in this case because the complaint purportedly pleads direct anticompetitive effects. Indeed, its briefing below implicitly conceded that the complaint had to allege a relevant market and allege that defendants possessed power in that market. HWC argued that the relevant market was the market in restraint training services for OCFS-licensed child care providers, and contended that the complaint sufficiently alleged that OCFS, as the licensing authority, possessed power within that market. *See* Pls.' Consolidated Br. Opposing Defs.' Mot. to Dismiss at 12-14, *Chapman v. N.Y. State Div. of Youth*, No. 1:04-cv-0867 (DNH/RFT) (N.D.N.Y., filed Dec. 29, 2004); Br. for Plaintiffs-Appellants at 24-39, *Chapman v. N.Y. State Div. of Youth*, No. 05-7010-cv (2d Cir., filed July 10, 2006); Reply Br. for Plaintiffs-Appellants at 32-41, *Chapman v. N.Y. State Div. of Youth*, No. 05-7010-

cv (2d Cir., filed Oct. 6, 2006).[4] HWC did not timely argue that detailed market analysis was unnecessary to sustain the complaint; it raised that argument for the first time in its petition for rehearing in the court of appeals.

Because HWC did not timely raise the question as to which it now seeks certiorari, the court of appeals' decision does not address the issue. The court of appeals did not hold, as petitioner claims, that detailed market analysis is necessary in every § 1 Rule of Reason case – or even that it is necessary in this case, because HWC effectively conceded that its complaint was required to specify the relevant market. The court of appeals merely rejected HWC's argument that the market was properly defined as the market for training OCFS-licensed New York child-care providers. After determining that the relevant market was the nationwide market for restraint training services as a whole, the court of appeals concluded that HWC had not alleged that OCFS possesses any power in that market with which it could impose anticompetitive conditions. (*See* Pet. App. 39a)

If HWC had timely argued that elaborate market analysis was unnecessary to its § 1 claim, the argument would not have saved its complaint from dismissal. While this Court and many others have held that detailed market analysis is unnecessary when a complaint challenging a horizontal agreement among competitors

4. In the lower courts, HWC also asserted in passing that the complaint could be read to allege a per se § 1 violation, but it offered no argument in that regard. Pls.' Consolidated Br. at 14; Br. for Plaintiffs-Appellants at 36. In its petition to this Court, it expressly limits the question presented to a Rule of Reason claim under § 1 and raises no issue about per se liability.

(which are more suspect than vertical agreements) pleads direct anticompetitive effects,[5] this case does not involve any horizontal restraint. Rather, as the district court recognized (Pet. App. 23a), HWC essentially alleges that OCFS has an exclusive dealing relationship with Cornell to provide training services to PFAs. The complaint asserts that OCFS, which approves PFAs' restraint policies and pays their training costs, will approve only the use of TCI (J.A. 31-32, 39-40).[6]

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5. *See NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 109 (1985) (elaborate market analysis not required where all major market competitors agree to "a naked restraint on price and output"); *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 461-62 (1986) (detailed market analysis not necessary where an overwhelming majority of competing firms in localized markets engage in "[a] concerted and effective effort to withhold . . . information desired by consumers for the purpose of determining whether a particular purchase is cost-justified"); *Todd v. Exxon Corp.*, 275 F.3d 191, 214 (2d Cir. 2001) (§ 1 claims alleging a horizontal agreement to exchange salary information survive dismissal where the complaint "specifically alleges that salary levels across the integrated oil and petrochemical industry have been artificially depressed because the information exchange has reduced competitive incentives").

6. The complaint thus fails to plead a plausible § 1 violation because it includes no facts that would support an inference that any conspiracy to restrain trade existed. The complaint's conclusory allegations that OCFS, Cornell, and others conspired to restrain trade are not sufficient. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007) ("a naked assertion of conspiracy in a § 1 complaint" does not suffice). Apart from those conclusory allegations, the complaint alleges only unilateral action taken by OCFS alone, which cannot constitute a violation of § 1. *Fisher v. Berkeley*, 475 U.S. 260, 267 (1986).

Exclusive dealing arrangements are not disfavored, and they violate the antitrust laws only when they "foreclose competition in a substantial share of the line of commerce at issue," such that "opportunities for other [suppliers] to enter into or remain in that market [are] significantly limited." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 328 (1961). Under this test, a plaintiff challenging an exclusive dealing arrangement must present at least a rough market analysis; to show that competition has been foreclosed in a substantial share of the relevant market, the plaintiff must at least identify that market. *Id.* at 327 ("the threatened foreclosure of competition must be in relation to the market affected"); *see also* IIB Philip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application* § 531e (3d ed. 2007) ("market definition is required" to assess whether vertical restraints such as exclusive dealing arrangements "foreclose actual or potential rivals from needed access to customers or suppliers").

Therefore, given the particular type of anticompetitive restraint HWC challenges here, at least some understanding of the relevant market was required. The court of appeals' holding that the relevant market is the national market for restraint services as a whole, which is unchallenged in the petition, would doom any showing of significant foreclosure under *Tampa Electric*. HWC does not allege that OCFS occupies a significant share of the national market for restraint services, nor is it plausible that this is so.

In addition to its failure to allege significant foreclosure in the relevant market, the complaint

contains no plausible allegation of direct anticompetitive effects. HWC focuses on the allegation that "TCI is currently charging New York State 4-10 times the rate that it charges for identical services provided to out-of-state customers" (J.A. 40). But that allegation, assuming it is true, means only that OCFS is overpaying for restraint training contracts. The antitrust laws require harm to competition as a whole; that one buyer may pay too much in a small segment of the overall market, while perhaps imprudent, does not evidence harm to competition.

II. There Is No Relevant Circuit Split.

The petition (at 19-27) incorrectly argues that there is a circuit split "as to whether a plaintiff who pleads or shows actual detrimental effects from antitrust misconduct is relieved from the burden of also specifically defining a market in order to assess a defendant's market power." As HWC points out (Pet. at 12-17), this Court has held on multiple occasions that the fullest market analysis is not required in every § 1 case. *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 779 (1999) (not all § 1 cases under the Rule of Reason require "plenary market examination"); *Ind. Fed'n of Dentists*, 476 U.S. at 461 ("finding of actual, sustained adverse effects on competition" in particular localized markets is sufficient "even in the absence of elaborate market analysis"); *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 109 (a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis"). Unsurprisingly, every court of appeals to address the issue has followed these holdings and held that a § 1 plaintiff may dispense with

detailed market analysis where it establishes direct anticompetitive effects.

Indeed, contrary to HWC's claims, the Second Circuit has never held that detailed market analysis is required in every § 1 Rule of Reason case; it has repeatedly recognized that such claims may be proved by showing direct anticompetitive effects. The petition therefore asks this Court to grant certiorari to correct a supposed error of law that the Second Circuit has never made – in this case or any other.

The court of appeals' leading decision on the point, *Capital Imaging Associates v. Mohawk Valley Medical Associates, Inc.*, 996 F.2d 537 (2d Cir. 1993), observes that market power (which is often shown through detailed market analysis) is not "the *sine qua non* of antitrust liability," although it is typically a "highly relevant factor" given its "particularly strong relationship to a party's ability to injure competition." 996 F.2d at 546. *Capital Imaging* further recognizes that a plaintiff may proceed under the Rule of Reason "without 'detailed market analysis' by offering 'proof of actual detrimental effects, such as a reduction in output.'" *Id.* (quoting *Ind. Fed'n of Dentists*, 476 U.S. at 460-61).

The Second Circuit has reiterated this view many times, most recently in *Geneva Pharmaceuticals Technology Corp. v. Barr Labs., Inc.*, 386 F.3d 485 (2d Cir. 2004). There, the court stated: "We have not required proof of market power in § 1 cases. If plaintiff can demonstrate an actual adverse effect on competition, such as reduced output, there is no need to show market

power in addition." 386 F.3d at 509 (citations omitted); *see also Todd*, 275 F.3d at 206 (noting that "a threshold showing of market share is not a prerequisite for bringing a § 1 claim," and holding that the complaint sufficiently alleged direct anticompetitive effects to survive a motion to dismiss); *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995) ("This court has not made a showing of market power a prerequisite for recovery in all § 1 cases.").

HWC (Pet. at 25) contends that the Second Circuit has turned its back on *Capital Imaging* and its progeny in favor of "a very strict test" of § 1 liability requiring detailed market analysis in every Rule of Reason case. It is mistaken. *Capital Imaging* remains good law; it has not been overruled or even criticized by the Second Circuit.[7] As supposed support for its contrary position, HWC points to language from recent Second Circuit decisions stating that an antitrust plaintiff "bears the initial burden of showing that the challenged action has an actual adverse effect on competition as a whole in the relevant market." Pet. 25 (quoting several cases). But that language, which comes from *Capital Imaging* itself, does not imply that a detailed market analysis is required in every § 1 case. The reference to "competition

7. HWC (Pet. at 24) also argues that in *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), the court "ducked" the question whether a showing of market power is always required. But in *Visa U.S.A.*, as in this case, no party disputed that market analysis was appropriate, and the court ultimately affirmed the district court's finding that defendants possessed power in the relevant market. *Id.* at 238. Indeed, the court acknowledged in a footnote that authorities suggested that a showing of market power is not always necessary. *Id.* at 238 n.4

as a whole in the relevant market" merely emphasizes that a plaintiff must show harm to competition, not to any particular competitor. As the Second Circuit explained in *Capital Imaging*:

> [P]laintiff bears the initial burden of proving that the challenged action has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice. Insisting on proof of harm to the whole market fulfills the broad purpose of the antitrust law that was enacted to ensure competition in general, not narrowly focused to protect individual competitors.

996 F.2d at 543. The passage does not suggest that elaborate market analysis is the only way to establish harm to competition as a whole, and the decision elsewhere expressly holds that a § 1 claim may be established by showing direct anticompetitive effects.

Nor does HWC identify any other court of appeals that requires detailed market analysis where a § 1 plaintiff shows direct anticompetitive effects. The petition acknowledges that the Fifth, Sixth,[8] Eighth,

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8. The petition observes that the Sixth Circuit held in *Nilavar v. Mercy Health System-Western Ohio*, 244 Fed. Appx. 690, 695 (6th Cir. 2007), that significant evidence of competitive harm may obviate the need for the plaintiff to define a geographic market and show market power. Pet. at 19. But petitioner (Pet. at 21) also notes that an earlier decision from the Sixth Circuit, *Worldwide Basketball & Sport Tours v. NCAA*, (Cont'd)

Ninth, and Eleventh[9] Circuits correctly do not do so. Pet. at 19-20. Although HWC does not discuss the District of Columbia Circuit, that court follows the same rule. *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35 (D.C. Cir. 2005) (a plaintiff need not always offer "elaborate market analysis" to sustain a § 1 Rule of Reason claim).

HWC suggests that the Seventh Circuit is on the "minority" side of the purported "split," but it is not. The Seventh Circuit has squarely held that a §1 plaintiff may prove a claim under the Rule of Reason either of two ways: (1) by offering "direct evidence of anticompetitive effects," or (2) more commonly, by proving "relevant product and geographic markets and . . . showing that the defendant's share [of that market] exceeds whatever threshold is important for the practice in [question]." *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000). That is the same rule HWC advocates in its petition.

While ignoring *Toys "R" Us*, HWC (Pet. at 21) criticizes a more recent case from the Seventh Circuit,

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(Cont'd)

388 F.3d 955, 960-61 (6th Cir. 2004), appears to excuse detailed market analysis only in a somewhat narrower class of cases. To the extent any tension may exist between these two decisions around the margins of the issue, the Sixth Circuit should be permitted an opportunity to resolve that tension on its own, particularly given the consistency in other circuits' views.

9. The petition's reference (at 22) to a supposed special rule adopted by the Eleventh Circuit for patent cases is not relevant here, because this is not a patent case.

Republic Tobacco Co. v. North Atlantic Trading Co., 381 F.3d 717 (7th Cir. 2004). That case, however, actually acknowledges that certain § 1 claims may be proved by "direct evidence of anticompetitive effects," and further allows that, while past claims proved through direct evidence involved horizontal restraints, it may also be possible to prove an appropriate vertical-restraint claim through "direct anticompetitive effects analysis." *Id.* at 737.

The Seventh Circuit nevertheless held in *Republic Tobacco* that the particular plaintiff before it had failed to show by direct evidence that the challenged exclusive dealing contract had anticompetitive effects, because the plaintiff's argument was predicated on the existence of a southeast regional market in the relevant product, when the market was in fact national in scope. *Id.* In reaching that holding, the court noted that a § 1 plaintiff "may not dispense entirely with market definition." *Id.* HWC seizes on that statement (Pet. at 21), but it does not create any tension among the courts of appeals. It merely expresses the common-sense idea that even assessment of direct anticompetitive effects requires a general understanding of the relevant market, if not precise market definition and quantitative assessment of market share. As the court put it, "[e]conomic analysis is virtually meaningless if it is entirely unmoored from at least a rough definition of a product and geographic market." *Id.*

This Court's precedents say nothing different. The Court has been careful to state that "elaborate," "detailed," or "plenary" market analysis may be excused in certain cases; it has never suggested that direct-

effects analysis can proceed without at least some sense of the relevant market. Indeed, in the principal case cited by HWC, *Indiana Federation of Dentists*, the Court's direct-effects analysis was predicated on the understanding that the relevant markets "tend[ed] to be relatively localized" and that "heavy majorities" of the firms in particular localities had engaged in the alleged horizontal restraint. 476 U.S. at 460-61. Ultimately, even HWC does not seriously dispute that some rough understanding of the relevant market is required, arguing only that a plaintiff need not "specifically" or "precisely" define the market where direct anticompetitive effects are sufficiently shown (Pet. at 19, 23), a proposition that *Republic Tobacco* expressly recognizes.

III. The Question Presented Would Not be Reached On Review Here Because HWC's Claims Are Barred by State-Action Immunity.

In addition, this Court's review would be unwarranted because, regardless of the Court's position on the question presented in the petition, HWC's claims are barred under the threshold doctrine of state-action immunity. *See generally Parker v. Brown*, 317 U.S. 341 (1943).

While both lower courts declined to decide the question of state-action immunity, the doctrine plainly precludes HWC's claims. It is settled that the Sherman Act does not apply to anticompetitive restraints imposed by the States "as an act of government." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S.

365, 370 (1991) (quoting *Parker*, 317 U.S. at 352)). *See generally* IA Areeda, supra, §§ 221-231. By alleging that OCFS has imposed a restraint on trade through its regulatory power to approve PFAs' restraint policies, the complaint alleges a restraint imposed by the State itself.

To be sure, this Court has thus far recognized only state legislatures and highest courts as representing the sovereign State for the purpose of *Parker* immunity, and it has expressly reserved the question whether a State's executive branch enjoys similar status. *See Hoover v. Ronwin*, 466 U.S. 558, 568 n.17 (1984). Nonetheless, the circuit courts have generally viewed state executive branch agencies as the State itself where the agencies are politically accountable to the State and thus not beholden to special business interests. *See Neo Gen Screening, Inc. v. New England Newborn Screening Program*, 187 F.3d 24, 28-29 (1st Cir.) (state university), *cert. denied*, 528 U.S. 1061 (1999); *Charley's Taxi Radio Dispatch Corp. v. SIDA of Haw., Inc.*, 810 F.2d 869, 875-76 (9th Cir. 1987) (state department of transportation); *Green v. State Bar*, 27 F.3d 1083, 1087 (5th Cir. 1994) (counsel for state committee on unauthorized practice of law, created by state statute, a state agency entitled to *Parker* immunity). *See also* IA Areeda, supra, § 224b (designation as "state itself" appropriate for those governmental agencies that are both statewide in their jurisdiction and have no particular susceptibility to capture by a particular business group).

Like the agencies involved in these cases, OCFS is a state executive agency that undertakes state functions

and is politically accountable to the State. OCFS possesses statewide jurisdiction and is headed by a commissioner who is appointed by the Governor, on advice and consent of the New York State Senate, and thereafter serves at the Governor's pleasure. N.Y. Exec. Law § 500(1). The agency was created to supervise, among other things, foster care, child protective services, and day care for children, all issues of statewide importance. It operates pursuant to statewide regulations that its commissioner is expressly empowered to promulgate. *See* N.Y. Soc. Serv. Law §§ 20(3)(d), 34(3)(f). Its actions are the actions of the State for the purpose of *Parker* immunity.

But even if OCFS could be viewed as something less than the State itself, and more akin to a state political subdivision, immunity would attach. This Court has held that local governments and other political subdivisions, although not themselves sovereign, enjoy immunity when they act pursuant to a "clear[ly] articulat[ed]" state policy to supplant competition. *Omni Outdoor Advertising*, 499 U.S. at 372. This test does not require "specific, detailed legislative authorization" for the alleged anticompetitive conduct. *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 415 (1978) (plurality op.). Rather, immunity applies if the subdivision's anticompetitive conduct is a "foreseeable result" of authority delegated to it. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985).[10]

10. By contrast, the anticompetitive acts of private parties are protected by state-action immunity only where the "clear articulation" standard is satisfied and the State itself actively supervises the private parties' actions. *Cal. Retail Liquor*

(Cont'd)

This standard of foreseeability is satisfied here. New York's Legislature expressly vested OCFS with authority to regulate voluntary authorized agencies and to license the residential child-care facilities that such agencies operate. *See* N.Y. Soc. Serv. Law §§ 375–378, 460-b, 460-c, 462; *see also* Welfare Reform Act, ch. 436, pt. B, § 122, 1997 N.Y. Laws 2806, 2869, 2922. The Legislature directed OCFS's commissioner "to promulgate regulations concerning standards of care and treatment . . . which shall apply to all facilities exercising care or custody of children." N.Y. Soc. Serv. Law § 462(1)(a). Moreover, the Legislature specifically required OCFS to establish as a priority that child-care workers receive training in safety and security procedures and techniques in child management, including crisis intervention. *Id.* § 462(1)(c). Even if the Legislature may not have had the precise nature of OCFS's alleged arrangement with Cornell in mind, it was foreseeable that OCFS would provide residential

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(Cont'd)

Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 106 (1980). The "active supervision" requirement does not apply to restraints imposed by political subdivisions. *Town of Hallie*, 471 U.S. at 46-47.

Here, although the complaint names Cornell as a defendant, it does not allege that Cornell itself imposed any restraint on trade, essentially asserting only that Cornell accepted the State's invitation to be its exclusive supplier. Thus, if the State's exclusive use of Cornell's services is immune from antitrust liability, Cornell cannot be subject to antitrust liability either. *See* IA Areeda, supra, § 227a ("Where private parties act together with state agencies or officials, it is necessary to determine who 'caused' or 'imposed' the relevant restraint. If the state itself has done so, there is no antitrust liability.").

child-care facilities with the necessary training through a chosen provider – in this case, an educational institution eligible for federal grant funding.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

HANDLE WITH CARE BEHAVIOR MANAGEMENT SYSTEM, INC.,

Petitioner,

v.

NEW YORK STATE DIVISION FOR YOUTH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INTRODUCTION

Petitioner is in the business of marketing a behavior management program for use by people working in an institutional or other organizational setting who must physically restrain individuals in their custody. Petitioner's program employs a series of manuals, performance-based training sessions, and audio visual productions, which they market to entities within New York State, throughout the United States, and internationally. Petitioner commenced this action on July 22, 2004, alleging ten causes of action against eighteen named defendants, including New York State administrative agencies and individually named state employees (hereinafter collectively "State Respondents"), Cornell University and various sub-units and individually named employees (hereinafter collectively "Cornell Respondents"), and Hillside Children's Center and individually named employees of Hillside. The complaint, in every imaginable theory, claimed that the State Respondents are unfairly excluding Petitioner from a limited portion of the market in favor of the Cornell Respondents and Cornell's training program called Therapeutic Crisis Intervention (hereinafter "TCI").

TCI is "a crisis prevention and intervention model for residential child care facilities" (J.A. 82).[1] It is designed to train staff in these facilities to "respond to both the feelings and behavior of children when they

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1. Citations to the Joint Appendix filed in the United States Court of Appeals for the Second Circuit are designated in this brief as "J.A. __."

are upset, in crisis, or at their most destructive" (J.A. 104). The TCI educational curriculum was first developed in 1980 in a research center based at the New York State College of Human Ecology at Cornell University (hereinafter "College") (J.A. 81, 104). The College is one of fourteen colleges and schools that comprise Cornell University, a private not-for-profit educational institution chartered under the laws of the State of New York. N.Y. Educ. L. § 5701 *et seq*. The College is defined as a "statutory" or "contract" college operated by Cornell on behalf of the State of New York. N.Y. Educ. L. §§ 350(3), 5714. Its mission is "the improvement of family well-being and human welfare by means of education, research, extension teaching, and related public service in the fields of human development and the use of human and environmental resources...." N.Y. Educ. L. § 5714(2). The operational aspects of the College, including creating academic programs and curriculums, maintaining discipline, and formulating educational policies, are committed to Cornell's private control as a matter of state law. N.Y. Educ. L. § 5714(3); *see also Alderson v. New York State College of Agriculture and Life Sciences at Cornell University*, 4 N.Y.3d 225 (2005). The first TCI curriculum developed in 1980 was funded by a grant from the State of New York, with additional grant funds in 1982 from the National Center on Child Abuse and Neglect in Washington, D.C. (J.A. 104).

The most recent pertinent relationship between the Cornell Respondents and State Respondents regarding TCI is defined by a Memorandum of Agreement executed in 1984 by Cornell and New York State Department of Social Services, now known as the Office

of Children and Family Services (hereinafter "OCFS"). (J.A. 141-154). The purpose of the Memorandum of Agreement is

> [t]o fulfill the related missions of the University's statutory charge as partner with and on behalf of state government to pursue the educational and general life improvement needs of the people of New York State, and the Department's responsibility as the state agency created to fulfill the social service needs of the state; [and to] carry out the intent of the parties with regard to optimizing procedures for funding and administering a variety of Federal and University supported, State-sponsored social services training programs in the pursuit of the parties' common public service mandate . . . .

(J.A. 141). Cornell retains ownership of the curriculum, training materials, and any inventions developed as part of TCI, and the state and federal governments have unlimited use of such materials to reproduce, distribute and utilize consistent with 45 CRF Parts 6 and 8 (J.A. 152 at § 5).

The causes of action relevant to this Petition are the seventh and eighth causes of action in the Complaint alleging violations of the Sherman Act, 15 U.S.C. § 1, which Petitioner styles as "monopolies, restriction of trade and unfair competition" (J.A. 39-41 at ¶¶ 81-93) and "conspiracy to monopolize and restrict trade" (J.A. 41-42 at ¶¶ 94-98). Petitioner's complaint alleges, in substance, that the State Respondents and Cornell Respondents conspired to fix the prices charged to

licensed facilities in New York, which are required by state law and regulations to have training in the restraint of juveniles in the care of those facilities (J.A. 31 at ¶¶ 36, 38, and J.A. 39-40 at ¶¶ 83, 88-90); *see* N.Y. Soc. Serv. Law §§ 371 (16), (17); 460-a, 460-b, 460-c, 462, 462-a, 462-b; 18 N.Y. Comp. Codes R. & Regs. § 441.17. Petitoner's allegations, however, fail to address the critical fact – a fact fatal to the claims – that the State of New York, not the facilities themselves, is the consumer (*see, e.g.*, J.A. 30-32, 39-40 at ¶¶ 27, 35-36, 40, 87, 91; *see also* 18 N.Y. Comp. Codes R. & Regs. §§ 427.1-427.5). Thus, ignoring the sound fiscal and public service goals that define the relationship between the alleged co-conspirators, Petitioner alleges a purported agreement between the State and Cornell to suppress competition, through which the State retains Cornell to provide services for the State and for which the State agrees – for reasons petitioner has not identified – to pay inflated prices. Petitioner's allegations are preposterous. Petitioner did not and cannot allege a plausible antitrust violation on these facts.

REASONS FOR DENYING THE PETITION

The Petition is laden with speculation regarding coercive conduct by the alleged co-conspirators and the anticompetitive effect of such conduct, but the complaint is devoid of facts to cast even a shadow of plausibility over the antitrust claims Petitioner strives to reinstate following their dismissal for failure to state a claim.

Despite the Petition's repeated references to the "pleading stage" of the case at the time of dismissal (*see, e.g.*, Petition pp. 9. 15, 20-21, 27), notably absent from the Petition is any mention of the pleading

standards recently analyzed and clarified by this Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007) and *Ashcroft v. Iqbal*, 556 U.S. __, 129 S. Ct. 1937 (2009). The omission is all the more striking because the complaint plainly relies on labels and conclusions to set forth the grounds upon which its claims rest, while both decisions soundly reject such assertions as an insufficient substitute for factual allegations: "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 556 U.S. at __, 129 S. Ct. at 1949, *quoting Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965.

I. Petitioner's Complaint Fails to State a Claim

The District Court had entered its judgment dismissing the case for failure to state a claim and the parties had fully briefed the appeal in the Second Circuit when this Court decided *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007). In *Twombly*, this Court expounded upon the pleading requirements for claims under § 1 of the Sherman Act, emphasizing that in order to state a claim the complaint must plead "plausible grounds to infer an agreement," that is, "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly*, 550 U.S. at 556, 127 S. Ct. at 1965. The Court wove this requirement directly into the fabric of Federal Rule of Civil Procedure 8(a)(2) that the complaint contain enough facts to "sho[w] that the pleader is entitled to relief." *Id.* at 557, 127 S. Ct. at 1966; *see also id.* at 556 n. 3, 127 S. Ct. at 1965 (noting that a "blanket assertion" of entitlement to relief is not enough). "[W]hen the

allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Id.* at 558, 127 S. Ct. at 1966, *quoting* 5 Wright & Miller § 1216, at 233-34 (internal quotations and citations omitted). Indeed, "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support a § 1 claim." *Id.* at 559-60, 127 S. Ct. at 1967, *quoting Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347, 125 S. Ct. 1627, 1634 (2005) (internal quotations and citations omitted, alteration in *Dura*).

More recently, the Court elaborated on the *Twombly* standard in *Ashcroft v. Iqbal*, 556 U.S. __, 129 S. Ct. 1937 (2009). The Court reiterated that a complaint must be "plausible on its face" to survive a motion to dismiss, meaning that the complaint must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 129 S. Ct. at 1949 (repeatedly citing *Twombly*).

The *Iqbal* Court clearly laid out the same two-pronged analysis used in *Twombly* to assess motions to dismiss. The first prong begins with the tenet that the court must accept as true the factual allegations pled in the complaint, but explicitly notes the inapplicability of that tenet to legal conclusions that a plaintiff attempts to disguise as factual allegations. "Threadbare recitals of the elements of a cause of action, supported by mere

conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949. So, the first step is to identify "pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 1950. Once these allegations have been identified and discounted, the court must review the remaining well-pleaded, nonconclusory allegations and determine whether they state "a plausible claim for relief." *Id.* Common sense and judicial experience are to be applied, and if the well-pleaded, nonconclusory facts do not permit an inference beyond a mere possibility of misconduct, the complaint should be dismissed because "the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Id.*, *quoting* Fed. R. Civ. Pro. 8(a)(2).

A. Petitioner Fails to Plead Facts for a Plausible Conspiracy

Applying the *Twombly-Iqbal* analysis, Petitioner's complaint fails as a matter of law for two separate reasons: (1) the economic theory underlying the conspiracy alleged by Petitioner is implausible on its face; and (2) the product and geographic markets alleged by Petitioner artificially and implausibly cherry-pick the only markets in which they can even allege that the State Respondents and Cornell Respondents are involved, ignoring the far broader market in which they actually compete to do business. Indeed, this pleading ploy was so transparent the District Court dismissed the complaint with prejudice based on petitioner's failure to define a proper product and geographic market to substantiate their claims and the impossibility of curing the defects through amendment of the complaint (Petition Appendix A, 20a-26a). The Second Circuit

affirmed, emphasizing the implausibility of the overly narrow market Petitioner tried to construct by defining "market" solely in terms of the harm they claim they suffered as a result of the respondents' alleged conduct, rather than taking into account, as the District Court properly did, the larger market in which Petitioner actually compete (Petition Appendix B, 37a-39a). This case simply does not present the facts necessary to address the question proffered in the Petition and, therefore, certiorari should be denied.

There are three sections of the complaint that are relevant to the § 1 claims before this Court: the "Factual Allegations" section (¶¶ 23-41), the Seventh Cause of Action (¶¶ 81-93), and the Eighth Cause of Action (¶¶ 94-98). Few paragraphs allege any action at all on the part of the Cornell Respondents. Indeed, the allegations against Cornell seem to be that Cornell developed a use of force program in conjunction with OCFS which Cornell administers and controls (¶ 35), that TCI illegally incorporated HWC's materials (¶ 37), that this "theft" somehow gave Cornell a monopoly (¶ 38), and that Cornell charges New York State 4-10 times more for training services than it charges out of state customers (¶ 40). Allegations conclusorily reiterating the creation of a monopoly, and charging New York State inflated rates are made in ¶¶ 90-91. The complaint also alleges that the Cornell Respondents "knew, participated in, acquiesced, benefited from or accepted the plan by which under color of state law TCI was allowed to obtain an exclusive monopoly" over the relevant training services (¶ 95) and that the Cornell Respondents knew or should have known about the inflated rates being charged (¶ 97). Petitioner makes

other allegations regarding the illegal procurement of federal funds, but these allegations are not relevant to the § 1 claim. The complaint also alleges that OCFS compelled private child care providers to use TCI as their training provider (¶¶ 36 and 88-89); however, these paragraphs do not allege any actions on the part of the Cornell Respondents.

Under *Iqbal*, Petitioner's bare conclusions masquerading as factual allegations are not entitled to an assumption of truth. *See also Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 337 (2d Cir. 2006) ("conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to defeat a motion to dismiss"). Petitioner's allegation that the conspiracy between the State Respondents and the Cornell Respondents creates a monopoly is a bare conclusion, not a legitimate factual allegation. Furthermore, the assertion that the Cornell Respondents "knew, participated in, acquiesced, benefited from or accepted" a plan to obtain an exclusive monopoly is analogous to the "bare assertion of conspiracy" that the Court found inadequate in *Twombly*. 550 U.S. at 556. These allegations are therefore not entitled to any presumption of truth.

Removing these allegations from the equation, all that remains of the alleged conspiracy are allegations that: the Cornell Respondents administer and control a restraint training program developed in conjunction with OCFS; the Cornell Respondents illegally incorporated Petitioner's materials into this program; and the Cornell Respondents charge New York State 4-10 times more for providing restraint training services

than charged to out of state customers. Even if true, none of these unsavory accusations evidence a conspiracy to restrain trade. *See Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 593, 106 S. Ct. 1348, 1359 (1986) ("[c]ourts should not permit fact finders to infer conspiracies when such inferences are implausible because the effect of such practices is often to deter pro-competitive conduct"). Cornell, as an educational institution, certainly has not done anything untoward by developing a restraint training program for use in the fields of human development and human resources. Illegally using Petitioner's materials, if true, might support a claim of copyright infringement, but Petitioner has never asserted such a claim against the Cornell Respondents and that matter is not before the Court.

When looking for a "plausible suggestion of conspiracy" it is clear that the facts presented do not, just as the facts presented in *Twombly* did not, nudge the pleaded claims "across the line from conceivable to plausible," and the complaint was properly dismissed with prejudice for the reasons stated by the District Court (Petition Appendix A, 21a-24a). *See Twombly*, 550 U.S. at 570, 127 S. Ct. at 1974. Petitioner failed to properly define the relevant market in economically meaningful terms. Moreover, the complaint itself alleges antitrust injury that is contradictory to the alleged conspiracy to monopolize trade in the market Petitioner artificially creates: "OCFS in conjunction with Cornell University, New York State College of Human Ecology and TCI have illegally coerced *monopoly control over* crisis intervention, behavior management and restraint training services to *private child care*

providers located within the State of New York" (J.A. 40 at ¶ 90, emphasis added), and yet the antitrust injury is purportedly to ". . . Petitioner's [sic] ability to *fairly compete for national and international training contracts* thereby causing injury . . ." (J.A. 40-41 at ¶¶ 93, 98, emphasis added). Petitioner's own admissions establish, at a minimum, a nation-wide market for the training services at issue.

Petitioner argued on appeal that the District Court misread Petitioner's relevant market allegations and that Petitioner did in fact present a plausible market of "training services to New York State child care providers." Petitioner's Brief at 25-26. The Second Circuit disagreed, finding that the District Court correctly identified Petitioner's allegations and found them implausible because they artificially limit the market to OCFS-regulated purchases within the State of New York where OCFS exercises decisionmaking, rather than the broader market in which Petitioner actually operates (Petition Appendix B, 39a). The District Court correctly concluded that the market must be viewed as a whole, that is, "the total demand for restraint services," not just in the child care area but in other areas including social services agencies, law enforcement agencies, correctional facilities, educational institutions, and airlines (Petition Appendix A, 23a; Petition Appendix B, 38a-39a). In fact, Petitioner's own allegations support this construction of the market, as Petitioner offers its behavior management program in all of these areas within the State of New York, throughout the United States, and internationally (*see* J.A. 26, 31, 40-42 at ¶¶ 4, 33, 93, 98; *see also* J.A. 235, 238, 242, 253, 259-261). Curiously, at page 9 of

the Petition, Petitioner goes so far as to rely upon the selection of their program over TCI's by the New York State United Teachers, arguing that this supports the superiority of their program over TCI. What Petitioner fails to recognize is that it also confirms a broader market than the one Petitioner attempts to concoct to support their claims. Anti-competitive conduct cannot be artificially constructed as Petitioner attempts to do here. This Court reviews factual allegations and inferences raised therefrom "in light of common economic experience" in order to assess the plausibility of an antitrust conspiracy theory. *Twombly*, 550 U.S. at 565, 127 S. Ct. at 1971. Petitioner's theory, constraining the market definition to the harm they suffered, is simply not plausible.

Moreover, Petitioner's allegation that Cornell is charging New York State exorbitant rates is actually suggestive that there is no conspiracy. As the allegation suggests, New York State pays the costs of restraint training for the private agencies in question (J.A. 32, 40 at ¶¶ 40, 91; *see also* 18 N.Y. Comp. Code §§ 427.1-427.5). Petitioner absurdly suggests that the State has conspired with Cornell to overcharge itself. Petitioner has tried to escape the obvious illogic of this allegation by suggesting that OCFS recovers 75% of the training costs from the federal government (Petition at p. 8). While that allegation does not even appear in the complaint, it is irrelevant because simple mathematics reveals that such a program would not benefit OCFS even with a 75% reimbursement from the federal government, because the 25% it is admittedly paying would still be artificially inflated by 4 to 10 times. Petitioner has not offered any economically plausible

explanation for why OCFS would conspire with Cornell to inflate the rates it pays Cornell thereby enriching Cornell at its own expense.

Petitioner's complaint plainly fails to state a claim under the standards articulated in *Twombly* and further explained in *Iqbal*. Removing the conclusory allegations from the Complaint results in allegations that do not even hint, much less plausibly suggest, a conspiracy that suppresses competition. The Court should deny the petition for certiorari on this ground.

B. An Exclusive Dealing Contract is Not Anti-Competitive

The allegations in this case posit a situation that is the functional equivalent of an exclusive dealing contract between New York State and Cornell. The complaint (as well as the enabling legislation and applicable regulations) contains allegations making it plain that it is New York State, and not the private foster care agencies, that is the true consumer in this case. Thus, as noted *supra*, Petitioner alleges in effect that the State and Cornell conspired to inflate the rate the State pays Cornell for the service provided. For example, Complaint ¶ 91 alleges that Cornell is charging New York State excessive prices for its services. Petitioner has not alleged and cannot allege that an exclusive dealing contract situation violates § 1 of the Sherman Act. The District Court recognized as much, basing its decision in part on the fact that "a proper antitrust market" cannot be "defined in terms of the purchase(s) of a single-buyer" (Petition Appendix A, 22a).

Exclusive dealing arrangements are "not disfavored by the antitrust laws." *Eastern Food Services, Inc. v. Pontifical Catholic University Services Association, Inc.*, 357 F.3d 1, 8 (1st Cir. 2004). Indeed, there may be "legitimate business justifications" (*Barr Laboratories, Inc. v. Abbott Laboratories*, 978 F.2d 98, 111 (3d Cir. 1992)) for such arrangements, which also "may be substantially procompetitive by ensuring stable markets and encouraging long-term, mutually advantageous business relationships." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45, 104 S. Ct. 1551, 1576 (1984) (O'Connor, J., concurring). Competition for an exclusive dealing contract is "a vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress." *Menasha Corp. v. News America Marketing In-Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004). Moreover, where there is "no rational motive to conspire, and the conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy [to fix prices or impede competition]." *Matsushita*, 475 U.S. at 596-97, 106 S. Ct. at 1361.

This Court has discussed exclusive dealing contracts in the related, although more broadly proscriptive, context of § 3 of the Clayton Act. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 335, 81 S. Ct. 623, 632 (1961) (noting that if an exclusive dealing contract does not violate § 3 of the Clayton Act, it by definition does not violate §§ 1 or 2 of the Sherman Act). In this context, the Court explained that exclusive dealing arrangements do not violate the antitrust laws unless it is "probable that performance of the contract will foreclose competition in a substantial share of the line

of commerce affected." *Id.* at 327. In making this determination "the threatened foreclosure of competition must be in relation to the market affected." *Id.* Thus, a complaint based on an exclusive dealing arrangement cannot state a claim unless the allegations therein provide some basis for inferring that the arrangement in question will significantly impair competition in a relevant market. "[T]he antitrust laws...were enacted for 'the protection of competition, not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S. Ct. 690, 697 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S. Ct. 1502, 1521 (1962)).

In this case, Petitioner has acknowledged that Handle With Care "provid[es] crisis intervention services in interstate commerce" (J.A. 26 at ¶ 4). The complaint alleges that Cornell also provides services like the ones it provides to OCFS to out of state customers (J.A. 40 at ¶¶ 91, 93). The Second Circuit highlighted Petitioner's admissions that "Handle With Care is marketed to and utilized by various organizations, institutions, and agencies that are not child care providers," and that "plaintiffs readily admit in their complaint that they compete for such contracts on a 'national and international' basis" (Petition Appendix B, at 38a). The Second Circuit found "[t]he unifying characteristic of this market is that each purchaser needs to restrain individuals, not just children" (Petition Appendix B, at 38a).

Even assuming as true the allegation in Petitioner's complaint that OCFS chose TCI as the preferred use of force training program for private child care providers

subject to licensing requirements administered by OCFS (J.A. 39-40 at ¶¶ 88, 89), that fact alone does not implicate anti-competitive conduct within the meaning of the antitrust laws. *See Balaklaw v. Lovell*, 14 F.3d 793, 797, 798-800 (2d Cir. 1994) (petitioner suffered a direct economic injury as a result of defendants' actions when he lost out in competition for an exclusive contract, but "there is no evidence that this injury was of the type the antitrust laws were intended to prevent") (internal quotations and citations omitted). Given the undeniably large market for the services Petitioner markets, there is simply nothing in the complaint that indicates that New York State's decision to purchase training in the restraint of children exclusively from Cornell has affected the market for Petitioner's services in any economically meaningful way. Again, the patent implausibility of Petitioner's conspiracy theory becomes apparent when one considers the reality of the market in which Petitioner admittedly operates. The complaint was properly dismissed with prejudice, and this Petition for certiorari should be denied.

II. The Petition Raises an Issue That Was Not Previously Raised or Litigated in This Action

It is not surprising that the Second Circuit did not address the argument Petitioner now advances in this Court — that it was not required to plead a relevant market – because it was not raised in the District Court and was not raised in the Second Circuit until after the decision affirming the District Court's dismissal was entered, when Petitioner filed an application for hearing en banc. Petitioner's arguments before the lower courts were instead predicated on the notion that the

complaint in fact had pleaded a relevant market, implicitly recognizing the validity of the requirement. It is the long-standing policy of this Court not to consider issues that were not considered by the courts below. *See e.g. Penn. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-213, 118 S. Ct. 1952, 1956 (1998) ("Petitioners raise this question in their brief . . . but it was addressed by neither the District Court nor the Court of Appeals . . . 'Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.'") (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2, 90 S. Ct. 1598, 1603 (1970)); *Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1, 97 S. Ct. 2720, 2724 (1977) (where "appellants sought to raise for the first time in their brief" a claim of unconstitutionality, the court declined to considered the issue because "[n]ot having been raised in the District Court, that issue is not before [the court]").

A careful examination of the Petitioner's arguments in the courts below plainly reveals that Petitioner did not properly raise or preserve in the courts below the issue now presented to this Court for adjudication. To the contrary, Petitioner repeatedly framed the issue in the context of the market analysis now claimed to be inapplicable. In opposition to the motions to dismiss the antitrust claims filed in the District Court, Petitioner argued that the antitrust claims were well pled, the complaint "clearly defines the market in issue," and further that the complaint "identifies a concrete geographic market." Plaintiffs' Consolidated Brief Opposing Defendants' Motions to Dismiss, *Chapman v. N.Y. State Div. of Youth*, 1:04-cv-0867 (Docket No. 67, at 12). Petitioner explicitly defined the market as "the

market in crisis intervention services that are available to Private Agencies that was illegally curtailed by OCFS." *Id.* at 13. Petitioner argued further that the complaint "unambiguously show[s] market injury" by alleging that all restraint-training vendors marketing to agencies licensed by OCFS had been "locked out of the market." *Id.* at 14. Notably, Petitioner did not argue that such a showing meant it was not required to plead a relevant market.

Instead, Petitioner argued that it was not required to plead a relevant geographic market, because the alleged conduct is a per se antitrust violation. This argument was apparently based on the fact that "Defendants [sic] anticompetitive conduct here was motivated solely by the desire to defraud the government," and such conduct "could never be justified by the 'rule of reason.'" *Id.* These arguments, which constitute approximately two pages of Plaintiffs' Consolidated Brief Opposing Defendants' Motions to Dismiss, are the entirety of Petitioner's analysis of the relevant market issue. Petitioner used the phrase "rule of reason" only once, on page 14, in the context of arguing that the conduct in issue constitutes a per se violation of § 1. No mention was made of Petitioner's argument in the pending Petition.

Before the Second Circuit, Petitioner again omitted the issue raised in the Petition, despite the fact that the relevant market requirement was a key issue on appeal. In the Corrected Brief for Plaintiffs-Appellants, *Chapman v. N.Y. State Div. of Youth*, 05-7010-cv (filed July 10, 2006), Petitioner asserts that the District Court misread Petitioner's relevant market allegations.

Petitioner argues that a market need only be "plausible," and that its market of "training services to New York State child care providers" is a plausible market. *Id.* at 26-27. Petitioner discussed the relevant regulatory scheme, arguing that OCFS plays an important role on both the seller's and the buyer's side of the market, and that such a unique regulatory scheme calls for a unique definition of market. *Id.* at 27-28. Petitioner further argued that "the propriety of the relevant market alleged is also amply demonstrated by the fact that the prices charged and paid in this market are significantly higher than in other markets." *Id.* at 29, *see also id.* at 30-35. Not once did Petitioner assert that there was no requirement of a detailed market analysis to substantiate its claims. Quite the contrary, Petitioner argued that because entry into the market is regulated, the regulated market is the relevant market in which to analyze its claims. *Id.* at 37; *see also id.* at 39 ("the relevant market analysis has merit").

The first time Petitioner actually asserted the argument upon which its Petition is based was in a petition for rehearing following the Second Circuit's decision, *inter alia*, affirming the District Court's dismissal of the antitrust claims. Petition for Panel Rehearing, Petition for Rehearing En Banc, *Chapman v. N.Y. State Div. of Youth*, 05-7010-cv (filed December 4, 2008), at 7-8. Petitioner argued, too little too late, that pleading specific and actual adverse effects on competition obviates the need to plead a relevant market, identifying the purported adverse effects in this case as "supracompetitive prices" and "the horizontal exclusion of vendors competing to provide restraint

training." *Id.* The issue was never litigated, however, because the Second Circuit denied the Petition for Rehearing (Petition Appendix C, 40a-41a).

In short, Petitioner implicitly – if not explicitly – acknowledged that it was required to plead a relevant market in all previous proceedings in this case, arguing explicitly that the complaint satisfied this requirement by pleading an appropriate market. Only after this argument failed both in the District Court and the Second Circuit did Petitioner shift ground to the position posed in the Petition. Given Petitioner's failure to raise the issue in the courts below, it was not preserved and certiorari should be denied on this ground as well.

III. The Cornell Respondents Adopt the Arguments Submitted by the State Respondents in Opposition to the Petition.

In addition to the arguments submitted herein, the Cornell Respondents incorporate by reference and adopt all arguments proffered by the State Respondents in opposition to the Petition as additional grounds to deny certiorari in this matter, to the extent such arguments are applicable to the Cornell Respondents.

In particular, at all stages of this litigation, both the State and Cornell Respondents have urged the courts to dismiss the complaint on the basis that the alleged misconduct is protected by the state action immunity doctrine. The conspiracy alleged by Petitioner clearly arises from the state's exercise of its sovereign power to regulate facilities providing care or custody of

children, and therefore it cannot form the basis of an antitrust claim – even if the state action has anti-competitive consequences. Thus, even if Petitioner's allegations of a conspiracy were true, they would fail to state a claim because the Cornell Respondents together with the State Respondents would have complete immunity under the long established state action immunity doctrine. *Parker v. Brown*, 317 U.S. 341, 350-352, 63 S. Ct. 307, 313 (1943) ("We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."); *see also California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*, 445 U.S. 97, 105, 100 S. Ct. 937 (1980) (conduct "actively supervised" by the state is entitled to state action immunity). As the foundation for Petitioner's conspiracy theory is the 1984 Memorandum of Agreement between Cornell and the State Department of Social Services (J.A. 141-154), and the complaint itself admits the active supervision of the State Respondents (J.A. 31, 39-40), there is no doubt that the Cornell Respondents are entitled to the protection of the state action immunity doctrine. Although neither the District Court nor the Second Circuit chose to engage in an analysis of this issue, having decided the § 1 claims on the relevant market requirement, it remains a valid ground on which this Court could and should decline to grant certiorari.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

HANDLE WITH CARE BEHAVIOR MANAGEMENT SYSTEM, INC.,

Petitioner,

- against -

NEW YORK STATE DIVISION FOR YOUTH, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF TO BRIEFS IN OPPOSITION

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REPLY TO THE BRIEFS IN OPPOSITION

Introduction

Petitioner Handle With Care Behavior Management System, Inc. ("HWC") submits this Reply to the Briefs in Opposition submitted by the State Defendants ("OCFS") and the Cornell Respondents ("Cornell").[1]

Respondents cherry-pick through the record, both factual and legal, and thus this Reply is necessary to correct their misstatements. In their collective 44 pages, Respondents also include no fewer than four "other reasons" for not granting the writ -- largely unrelated to the question HWC presents. In the space allotted, we endeavor to reply to all their points.[2]

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[1] For purposes of this Reply, "Cornell" shall also include Respondent The New York State College of Human Ecology ("CHE"), though it is a separate entity from Cornell.

[2] Citations used herein are as follows: HWC's Petition for Writ of Certiorari – "HWC-P"; Briefs in Opposition for OCFS and Cornell in this Court – "CBr __" and "NYBr __", respectively; OCFS's and Cornell's Second Circuit Briefs – "C2Br __" and "NY2Br __", respectively; HWC's Second Circuit Brief and Reply Brief – "HWC-2Br __"and "HWC-2R __"; "Joint Appendix" filed in the United States Court of Appeals for the Second Circuit – "JA __"; Complaint – "JA __ § __".

I. THE QUESTION PRESENTED DEALS WITH QUESTIONS OF LAW, ADEQUATELY PRESERVED BY THE ARGUMENTS BELOW, AND MERITS REVIEW BECAUSE OF ITS IMPORTANCE

Respondents err in contending that the question presented – whether HWC's allegations of actual anti-competitive effects made it unnecessary to plead a specific relevant market – was not preserved. Indeed, OCFS's argument during the motions to dismiss betray this assertion:

> Irrespective of the nature of the claim, *whether a per se violation or reasonable rule violation or quick look violation that requires more increased scrutiny*, ... the plaintiffs ... have failed to allege geographic market, [and] failed to allege product market .... (JA268)

In addition, in dismissing HWC's antitrust claims, the District Court ruled upon the precise issue of whether HWC was "free from the burden of engaging in market analysis to demonstrate the effect of defendant[sic] conduct on the market ...." (HWC-P 21a).

There is also no basis for the contention that HWC did not raise this matter before the Second Circuit prior to plaintiffs' petition for Rehearing *En Banc*, since HWC specifically argued:

> While these theories, or some of them, *might fall into a per se category, we* believe that for

> purposes of analyzing the anticompetitive nature of Defendants' conduct the market can properly *can be viewed to take account of the actual anticompetitive effect of the misconduct in the real-world economic circumstances*. (HWC-2Br, 36-37)

Thus, HWC made clear that a showing of "relevant market" should be dispensed with even in a "rule of reason" case.

Moreover, this Court has consistently held that a "purely legal question" may be "'appropriate for ... immediate resolution' notwithstanding that it was not addressed by the [lower] [c]ourt." *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 743, n. 23, 102 S.Ct. 2690, 2698, n. 23 (1982)). Clearly, the question squarely presented by HWC -- whether well-pled allegations of actual anti-competitive effects make it unnecessary to also plead a specific relevant market -- is a "purely legal question" that this Court has it within its power to resolve.

Additionally, because the question HWC presents is in essence merely an alternative *argument* asserted in support of plaintiffs' §1 claim, there is no procedural bar to the grant of its petition. As this Court stated in *Lebron v. National R.R. Passenger Corp*, 513 U.S. 374, 379 115 S.Ct. 961, 965 (1995)("[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.")

The question HWC presents similarly does not raise any new statutes or claims, but simply advances an additional argument as to why its §1 claim should not have been dismissed at the pleading stage. *See also Yee v. Escondido,* 503 U.S. 519, 534, 112 S.Ct. 1522, 1532 (1992)(since petitioners "raised a taking claim in the state courts, therefore, [they] could have formulated any argument they liked in support of that claim here"). *Accord: PGA Tour, Inc. v. Martin,* 532 U.S. 661, 678, n. 27, 121 S.Ct.1879, 1891 n. 27 (2001) (where Americans with Disabilities Act coverage issue was raised below, Court would entertain new argument regarding statute's scope).

Even assuming *arguendo* that the question presented in plaintiffs' petition was not sufficiently raised or addressed in the lower courts, this Court has consistently held that such is not in itself a bar to hearing and resolving important questions of federal statutory law. The rule discouraging the deciding of quetsions not raised in the lower courts is "not inflexible." *Youakim v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399 (1976). Moreover, when an issue is "important" and "recurring" (as surely the requirements of §1 claims are), this Court may "conclude that the interests of judicial administration will be served by addressing the issue on its merits." *Carlson v. Green,* 446 U.S. 14, 17 n.2, 100 S.Ct. 1468, 1471 n.2 (1980); *Accord: U. S. v. Mendenhall,* 446 U.S. 544, 552 n.5, 100 S.Ct. 1870, 1876 n.2 (1980)(where "question is essential to the correct disposition of the other issues in the case, we shall treat it as 'fairly comprised' by the questions presented in the petition for certiorari.")(quoting *Blonder-Tongue Laboratories v. University Foundation,* 402 U.S. 313, 320

n. 6, 91 S.Ct. 1434, 1438 n. 6 (citing *R. Stern & E. Gressman, Supreme Court Practices* 6.37 (4th ed. 1969)).

As HWC has presented to this Court a fundamental and recurring question of antitrust law about which there is an inter-Circuit split (See HWC-P, 19-27), there are compelling reasons to grant the writ under the standards discussed above. Moreover, the "question" is so inextricably intertwined with the "per se" issues fully argued in both the District and Circuit Courts as to dispel any concern that the Record is not fully developed to permit an adjudication of the question presented.

II. THERE IS A DEFINITE SPLIT AMONG THE CIRCUITS ON WHETHER A PLAINTIFF MAY STATE A VIOLATION OF §1 BY ALLEGING ACTUAL ANTI-COMPETITIVE EFFECTS, IRRESPECTIVE OF THE RELEVANT MARKET DEFINITION.

OCFS and Cornell blithely assert that there is no genuine split among the Circuits in applying *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61, 106 S.Ct. 2009, 2019 (1986) and its progeny, but that argument simply overlooks clear holdings to the contrary.

Perhaps most significant is *Republic Tobacco Co. v. North Atlantic Trading Co., Inc.*, 381 F.3d 717, 737 (7th Cir. 2004), where the Seventh Circuit, in a marked departure from the majority of other Circuits, expressed the view that *Indiana* does *not* allow a plaintiff to

"dispense entirely with market definition," but "[r]ather ... stand[s] for the proposition that if a plaintiff can show the *rough contours of a relevant market, and show that the defendant commands a substantial share of the market*, then direct evidence of anticompetitive effects can establish the defendant's market power - in lieu of the usual showing of a precisely defined relevant market and a monopoly market share." (Emphasis added).

In particular, *Republic Tobacco's* requirement that a plaintiff must show that "defendant commands a substantial share of the market" essentially eviscerates the holding in *Indiana* concerning "anti-competitive effects." This position was more recently followed in *In re Compensation of Managerial, Professional and Technical Employees*, 2008 WL 3887619 at *7 (D.N.J. August 20, 2008)("according to [*Republic Tobacco*], the direct evidence method does not 'allow an antitrust plaintiff to dispense entirely with market definition'").

Moreover, the Sixth Circuit, in *Worldwide Basketball & Sport Tours v. Nat'l Collegiate Athletic Ass'n*, 388 F.3d 955, 960-61 (6th Cir. 2004), *cert. denied*, 126 S.Ct.334 (2005), also took an unduly narrow view of *Indiana* in holding that proof of actual anti-competitive effects did not necessarily obviate the eventual need for a formal market analysis under the rule of reason, but instead was merely a restatement of "the abbreviated or quick-look analysis"):

> this abbreviated or "quick-look" analysis may only be done where the contours of the market and, where relevant, submarket, are sufficiently well-known or defined to permit

> the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition.

Id. at *961.*

To further illustrate the split among Circuits, the Second Circuit, in *Todd v. Exxon Corp,* 275 F.3d 191, 207 (2d Cir. 2001), Justice, then Circuit Judge Sotomayor expressly disavowed the very approach that the Sixth Circuit subsequently embraced in *Worldwide Basketball*:

> The use of anticompetitive effects to demonstrate market power, however, is not limited to "quick look" or "truncated" rule of reason cases. This Court's precedents discussed above were not "quick look" cases; they merely accepted alternative ways of demonstrating market power. *See K.M.B. Warehouse,* 61 F.3d at 127 (applying rule of reason); *Capital Imaging,* 996 F.2d at 545-46 (applying rule of reason)

This split among the Circuits, as well as uncertainty on the issue generally throughout the federal courts, is good reason for review of the question presented, particularly given the important role §1 plays in our national economic fabric.

III. THE §1 MISCONDUCT INVOLVED COLLECTIVE ACTION BY BOTH OCFS AND CORNELL – NOT AN EXCLUSIVE DEALING CONTRACT BETWEEN THEM

The Antitrust Misconduct by OCFS and Cornell Effectuated a Horizontal Exclusion by the PFAs of All Restraint Trainers Except Cornell

OCFS contends that, despite HWC's argument that "elaborate market analysis was unnecessary to its §1 claim," it would still have been dismissed because HWC does not allege any "horizontal restraint." NYBr 9-10. Likewise, OCFS argues that HWC "essentially" alleges that OCFS has an "exclusive dealing relationship with Cornell" to provide training to all the Private Foster Agencies ("PFAs") in New York. *Id.* Neither assertion is accurate.

There can be no doubt that *collective* conduct by Cornell *and* OCFS in violation of §1 is amply set forth in the complaint and related documents considered during the motions to dismiss. HWC's complaint alleges that OCFS, with the "participation" of Cornell, has "systematically refus[ed]" to allow the PFAs to select their own restraint training vendors, giving Cornell and OCFS a "monopoly situation within the State of New York, by disallowing PFAs the freedom to contract with HWC or any other vendor of restraint training (JA, 31,39-40)(¶¶ 34, 36, 38 86, 88-90).

OCFS has even used the threat of adverse regulatory and licensing actions to compel all PFAs to use

only Cornell's TCI program (JA, 39-40 ¶¶ 88-89), and, accordingly, to engage in a refusal to deal with HWC or other vendors of restraint training (JA, 40 ¶¶ 70-74, 90). As a result, PFAs expressing an interest in using HWC's (and others') programs were coerced by OCFS into *not* using HWC (JA, 37, ¶¶ 71-73). OCFS also indicated directly *to HWC* that OCFS would *simply not permit* HWC (or any vendor other than Cornell) to provide restraint training to the PFAs (JA, 37,39-40¶¶ 73, 88, 89). The complaint further alleges that PFAs "*can only use TCI as their use of force training provider or risk their license and ability to do business within the State of New York*" (JA39-40 ¶ 88; emphasis added). Further details of this coercive conduct are described in, plaintiff's 2d Circuit brief (HWC-2Br, 10-15).

Moreover, there can be no better demonstration of Cornell's participation in this misconduct than Cornell's signature on the Memoradum of Agreement ("MOA") submitted by Respondents in connection with their motions to dismiss (JA 141-54). The most explicit goal in the MOA, leaving aside the ambiguous language to pursue "general life improvement needs," is to help *maximize* federal funding (JA-141; JA-40, ¶ 91). Cornell participated in that maximization by charging – and OCFS by paying – excessive, anticompetitive prices for training the PFAs, all while jointly acting to exclude any other vendors from servicing the PFAs (HWC-2R, 7-8). This was no arms-length exclusive dealership, but a concerted effort by Respondents.

This Court would have little difficulty characterizing as a violation of §1 a situation where collective action were taken by all 160 PFAs in New York,

as a *state-wide horizontal array of buyers,* to exclude all but TCI as their trainer. Such conduct would violate §1, and would likely even do so irrespective of any relevant market. The consumers of the services of the PFAs including the governmental entities that fund them, would be injured by any pricing mischief that resulted. Here, however, the boycott of HWC and other vendors of restraint training was accomplished not by an agreement *among* the PFAs, but rather was imposed *on them* by OCFS, acting with Cornell.[3] This would constitute a violation of §1 *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 231(2d Cir. 2004).

The PFAs Are Injured Consumers – *Not* OCFS

Respondents' efforts to characterize OCFS as the only entity involved in paying for Cornell's training is also in error.

The 160 PFAs are private, autonomous, not-for-profit, corporations operating foster care homes, run by their boards and chief executive officers, with only regulatory oversight by OCFS. *See* (HWC-2Br, 10-12). OCFS's own regulations mandate that a PFA's CEO (*not* OCFS) "direct . . . all aspects of a[] [PFA's] program," including "staff development and training." *Id.*

The PFAs receive partial reimbursement by the county governments and also by OCFS. One type of PFA expense eligible for reimbursement is "staff

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[3] HWC made this argument in its Second Circuit submissions, but Respondents simply did not answer the point. *See* HWC-2R 44

development," which includes "training." 18 NYCRR §427.3; OCFS, *Standards of Payment for Foster Care of Children Program Manual*, § C-28 (August, 2006). Notably, only "reasonable" costs for hiring outside training services are allowable. *Id.* §C-23. Such costs (both prospectively and for past fiscal years) are reported to OCFS by the PFAs under the category of "administration," for which they are reimbursed. *Id.* § B-1; 18 NYCRR §§427.1, 427.5. N.Y. Social Services Law § 398-a. *See also* N.Y. Social Services Law §153-k. The fact that OCFS may advance the maximum state reimbursable amount to the PFAs does not, therefore, mean that the training is *free* to the PFAs, which must fund at least 35% of their costs through other means *Id.* NY Social Services Law §153-k. Moreover, even absent demonstrable *economic* harm to the PFAs, they have been harmed by virtue of the subversion of their *choice* of a restraint trainer, and restriction of quality competition is another type of anti-competitive behavior condemned by the antitrust laws.

Hence, Respondents have interfered with the PFAs, as consumers of restraint training services. Likewise, HWC and other vendors of restraint training have suffered antitrust injury by their exclusion from offering their services to the PFAs.

IV. RESPONDENTS' INVOCATION OF "STATE ACTION IMMUNITY" UNDER PARKER-MIDCAL IS FLAWED

This issue was never decided by the District Court nor the Second Circuit. Respondents' renewal of this purported affirmative "defense," on which they have the burden of proof, will not help them here.

The actions of OCFS, which are *contrary* to its own regulations investing PFAs with substantial autonomy, can not be considered the acts of the State itself. Moreover, contrary to Respondents' assertion, there was no "clearly articulated" state policy to supplant competition. Nor was the coercive conduct by OCFS and Cornell a "foreseeable result" of the general authority delegated to it by the statutes cited.

In short, our national policy in favor of competition "cannot be thwarted by casting such a gauzy cloak of state involvement . . .." (HWC-2R, 22). For the reasons stated above, as well as in HWC's Reply Brief in the Second Circuit (HWC-2R, 11-26), this defense should be rejected.

CONCLUSION

The Petition should be granted, the Decision of the United States Court of Appeals reversed and its Judgment vacated, and the case remanded for further proceedings.

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